Supreme Court, U.S.
FILED

No. 09-_____ 09-379 SEP 25 2009

OFFICE OF THE CLERK

In The
Supreme Court of the United States

WILBUR ALLMOND,

Petitioner,

v.

AKAL SECURITY, INC., and ERIC HOLDER,
Attorney General of the United States,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, Washington 98195
(206) 616-3167

JOHN GRIFFIN
MAREK, GRIFFIN & KNAUPP
203 North Liberty Street
Victoria, Texas 77901
(361) 573-5500

KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Boulevard
Houston, Texas 77008
(713) 526-5677

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTION PRESENTED

Under the Americans with Disabilities Act and the Rehabilitation Act, is it lawful for an employer to dismiss a worker with a disability merely because a conceivable situation "may" occur in which that employee would pose a risk to safety, without regard to how unlikely that occurrence might be?

PARTIES

The parties to this proceeding are set forth in the caption.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties	ii
Table of Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Statutes and Regulations Involved	2
Statement of the Case	2
(1) The Adoption of The Unassisted Hearing Test	3
(2) The Fifth Circuit Litigation	7
(3) The Proceedings Below	11
Reasons for Granting the Writ	12
I. There Is an Inter-Circuit Conflict Regarding The Degree of Risk Necessary To Justify The Exclusion of An Individual With A Disability	12
A. The Americans With Disabilities Act	22
B. The Rehabilitation Act	24
C. Title VII	29
II. The Question Presented Is of Substantial Importance	30
III. This Case Presents An Appropriate Vehicle for Resolving The Question Presented	34
Conclusion	39

TABLE OF CONTENTS – Continued

Page

Appendix

Opinion of the Court of Appeals for the Eleventh, February 20, 2009 ..... 1a

Order of the District Court for the Middle District of Georgia, September 28, 2007 ..... 11a

Order of the Court of Appeals for the Eleventh Circuit Denying Rehearing, May 28, 2009 ..... 47a

Statutes Involved 49a

TABLE OF AUTHORITIES

Page

CASES:

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) 31

Bates v. United Parcel Service, 511 F.3d 974 (9th Cir. 2007) 23

Bentivegna v. United States Department of Labor, 694 F.2d 619 (9th Cir. 1982) 24, 25, 30

Bernard v. Gulf Oil Corp., 841 F.2d 547 (5th Cir. 1988) 30

Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991) 29

Contreras v. City of Los Angeles, 656 F.2d 1267 (9th Cir. 1981) 30

Dothard v. Rawlinson, 433 U.S. 321 (1977) 21

EEOC v. Exxon Corporation, 203 F.3d 871 (5th Cir. 2000) ..... *passim*

EEOC v. Rath Packing Co., 787 F.2d 327 (8th Cir. 1986) 29

EEOC v. Service News Co., 898 F.2d 958 (4th Cir. 1990) 29

Foster v. The United States Marshals Services, 2005 WL 3742804 (N.D.Tex. 2005) 7

Fromm v. MVM, Inc., 2004 WL 5355973 (M.D.Pa. 2004) 7

Green v. Missouri Pacific R.R. Co., 523 F.2d 1290 (8th Cir. 1975) 29

TABLE OF AUTHORITIES – Continued

Page

Gunnels v. Akal Security, Inc., 2004 U.S. Dist. LEXIS 31104 (S.D.Tex.) 9, 10, 11

International Union, United Automobile, etc., Workers of America v. Johnson Controls, 886 F.2d 871 (7th Cir. 1989) (en banc) 29

International Union, United Automobile, etc., Workers of America v. Johnson Controls, 499 U.S. 187 (1991) 29

Knapp v. Northwestern University, 101 F.3d 473 (7th Cir. 1996) 26

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) 25, 26

Rock v. Norfolk & W. Ry. Co., 473 F.2d 1344 (4th Cir. 1973) 30

Ruiz v. Mukasey, 594 F.Supp.2d 738 (S.D.Tex. 2008) 7, 10

School Board of Nassau County v. Arline, 480 U.S. 273 (1987) 33

Strathie v. Dept. of Transportation, 716 F.2d 227 (3d Cir. 1983) 20, 26, 27

Verzeni v. Potter, 109 Fed.Appx. 485 (3d Cir. 2004) 18, 20, 28

Walton v. United States Marshals Service, 2003 WL 23875599 (N.D.Cal. 2003) 7

TABLE OF AUTHORITIES – Continued

Page

Wilson v. MVM, Inc., 2004 WL 765103 (E.D.Pa. 2004) 7

Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) 29

STATUTES:

28 U.S.C. § 1254(1) 1

29 U.S.C. § 504(a) 24

42 U.S.C. § 12102(2) 13

42 U.S.C. § 12111(3) 31

42 U.S.C. § 12112(b)(6) 14, 34

42 U.S.C. § 12113(b) 31

42 U.S.C. § 12113(3) 34

42 U.S.C. § 12201(a) 34

Americans With Disabilities Act ..... *passim*

Rehabilitation Act of 1973 ..... *passim*

Title VII, Civil Rights Act 21, 29

REGULATIONS:

10 C.F.R. Pt. 73, App. B, part I(B)(2)(b) 22

BRIEFS:

Brief for Petitioners, *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) 33

TABLE OF AUTHORITIES – Continued

Page

Brief for the United States and the Equal Employment Opportunity Commission As Amicus Supporting Respondent, *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999).....31

OTHER AUTHORITIES:

Fifth Circuit Pattern Civil Jury Instruction 11.7.4 ADA-Business Necessity Defense.....23

Petitioner Wilbur Allmond respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 20, 2009.

OPINIONS BELOW

The February 20, 2009 opinion of the Court of Appeals, which is reported at 558 F.3d 1312 (11th Cir. 2009), is set out at pp. 1a-10a of the Appendix. The May 28, 2009 order of the Court of Appeals denying rehearing en banc, which is not reported, is set out at pp. 47a-48a of the Appendix. The September 28, 2007 Order of the District Court for the Middle District of Georgia, which is unofficially reported at 2007 WL 2904023 (M.D.Ga.), is set out at pp. 11a-46a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on February 20, 2009. A timely petition for rehearing en banc was denied on May 28, 2009. On August 13, 2009 Justice Thomas granted an application extending the time to file a petition for writ of certiorari until September 25, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are set forth in the Appendix to the petition.

STATEMENT OF THE CASE

The Americans with Disabilities Act and the Rehabilitation Act forbid the use of qualification standards that discriminate against employees or applicants with disabilities. The courts of appeals apply different legal rules in determining when such a qualification standard is justified by a safety-related purpose. In 2001 the United States Marshals Service adopted a new medical standard for court security officers; based on that standard, the Marshals Service subsequently directed the dismissal of a number of court security officers who worked in federal courthouses throughout the country. Those dismissals were successfully challenged in several cases brought in the Fifth Circuit. In the instant case, however, on essentially the same record, the Eleventh Circuit upheld the disputed standard.

(1) The Adoption of The Unassisted Hearing Test

In the lower courts the screening of visitors and mail at a Federal courthouse, and certain other security tasks, are the responsibility of court security officers ("CSOs"). Courtroom security in a criminal case is provided by United States Marshals.[1] The CSOs are hired by and work for a number of different private firms who contract to provide that service to the United States Marshals Service ("USMS"). Respondent Akal Security, Inc. is one of those private firms, providing CSOs for the federal courts in Georgia and a number of other states.

Individuals working as CSOs have long been required to pass a physical examination, including a hearing test. Prior to 2001 applicants and current CSOs could use hearing aids when taking that test.[2] In 2001, however, the USMS proposed and the Judicial Conference adopted a new standard governing hearing tests, for the first time barring applicants and CSOs from using hearing aids to pass the hearing test. That change was part of the CSO Medical Standards adopted in that year. The original rationale and origin of the unassisted hearing test is a matter of dispute.[3]

---

[1] R 4-82, Ex. R.

[2] R 5-101, Ex. B (R 5-101 refers to Docket No. 101 in volume 5 of the record on appeal).

[3] The 2001 Medical Standards were developed in light of a series of interviews with a significant number of CSOs. Both

lower courts in the instant case attached importance to that study. (App. 8a, 42a). However, under questioning the official who conducted the study conceded that none of the CSOs interviewed had ever been asked any questions at all about either hearing aids or CSOs who used them. (R 4-78, Ex. 3-2, at 5, 14-15; 5-101, Ex. G, at 193-94).

There was testimony that during the discussions of the proposed medical standards the Judicial Conference Committee on Security and Facilities was advised that hearing aid batteries "may be prone to failure." (R 5-102, Attach. 4, Defendants' Response to Plaintiff's Statement of Facts, at 8 par. 44; see R 4-80, Ex. G, at 28 lines 10-19). In the instant litigation, however, the Department of Justice has never asserted that hearing aid batteries are less reliable than other batteries.

The government official who recommended adoption of the unassisted hearing test, Dr. Richard Miller, stated in a 2006 affidavit in this case that he was responsible for devising that standard. (R 4-78, Ex. 3-1, at 13 ("Dr. Cook did not create the CSO standards.")) But in 2002 Dr. Miller stated in a sworn deposition that Dr. Cook of the Naval Medical Center had framed the disputed standard. (Ruiz Tr., v. 2, at 197 ("Question. With regards to the hearing standards for court security officers, who developed the hearing standards" Answer: Dr. Lynn Cook. Question: And do you know what factors she considered in developing the hearing standards? Answer: No, I don't.")

Dr. Miller did not claim to know anything about the reliability or efficacy of hearing aids; he explained that before he made that recommendation he had "consulted" with Dr. Cook. (R 4-78, Ex. 3-1, at 13-14, Miller Decl., par. 23, 25; Ex. 3-2 at 7.) Several years later in the *Ruiz* case (see pp. 9-10, *infra*), however, Dr. Cook stated that she could not "recall any direct conversations at the time with Dr. Miller that he was performing that project." (Ruiz Tr., v. 2, at 436). The only information which Miller stated he received from Dr. Cook about possible failures of hearing aids was the generic argument made by the government in the courts below, that

> hearing aids are mechanical devices *and as such* are subject to loss, malfunction, and breakage. Batteries

This new requirement of an unassisted hearing test differed in several respects from the manner in which other possible impairments were dealt with under the 2001 CSO Medical Standards. First, applicants and CSOs are permitted to use corrective measures when taking tests other than the hearing test. For example, individuals taking the vision test are permitted to wear glasses or contact lenses. Second, unlike the automatic disqualification of individuals who fail the hearing test, most of the more than 150 medical conditions covered by the 2001 CSO Medical Standards merely "may" result in disqualification, but are assessed on an individualized "case-by-case" basis. Individuals with such medical conditions will be disqualified if there is an individualized determination that a condition "is likely to adversely affect safe and efficient job performance." Some conditions, such as color blindness or the use of a pacemaker are categorized as "generally disqualifying," but unlike the non-assisted hearing test even these conditions are not automatically a bar to employment as a CSO. Among the serious medical conditions which are assessed on a case-by-case basis, but are not even "generally" grounds for disqualification, are narcolepsy, congestive

---

> die and hearing aids may be dislodged in a physical confrontation.

(R 4-78, Ex. 3-2, at 15 (emphasis added)); see R 4-78, Ex. 3-1, at 13-14 (Milier received from Dr. Cook "input regarding ... the problems associated with hearing aids (as described below).")

heart failure, transient ischemic attacks and schizophrenia.[4]

In January 2001 Akal wrote to the USMS expressing concern about the legality of the medical standards.

> The new USMS medical qualifications are markedly more stringent than past practices. Akal is concerned that a strict pass/fail standard of these medical qualifications may expose both Akal and the USMS to liability under the Rehabilitation Act of 1973 [and] the Americans with Disabilities Act.[5]

Akal noted in particular that "in cases where a CSO is being disqualified for a condition that has existed for many years and has not affected performance in any way ... the liability of both parties is increased."[6] Akal noted that "[c]urrently many CSOs use hearing aids," and inquired whether there was "any USMS or Department of Justice regulation that allows for the imposition of the USMS medical qualifications on a categorical basis?"[7]

---

[4] R 4-78, Ex. 3-2, at 14; Ex. 3-3, at 12, 14.

[5] R 4-80, Ex. N, at 1.

[6] *Id.*, at 2.

[7] *Id.* at 2, 3. There are no such regulations. Exactly one month after Akal expressed those concerns to the Marshals Service, the Civil Rights Division of the Department of Justice began to take action against the Honolulu Police Department for requiring that police officers pass an unassisted hearing test. (R 5-101, Ex. P).

Following the adoption of the new standards, Akal appealed "every single one" of the orders of the USMS to terminate CSOs who could not pass the unassisted hearing test, desisting from those appeals only when ordered to do so by the United States.[8]

Following the adoption in 2001 of the unassisted hearing test rule, then-serving CSOs who utilized hearing aids were tested without hearing aids at annual physical examinations. Because of this change in testing method, the USMS ordered the dismissal of a number of CSOs throughout the country.[9]

(2) Fifth Circuit Litigation

Former court security officers who had been dismissed because of the unassisted hearing test have successfully brought suit under the ADA and the Rehabilitation Act in district courts in the Fifth Circuit.

David Gunnels worked as a court security officer at the federal courthouse in Houston; like Allmond he was an employee of Akal Security, Inc. In May 2002 Gunnels was dismissed because he was unable to pass the hearing test without his hearing aids.

---

[8] R 4-80, Ex. E, at 139, lines 2-22 and exhibits attached.

[9] E.g., *Ruiz v. Mukasey*, 594 F.Supp.2d 738 (S.D.Tex. 2008); *Foster v. The United States Marshals Services*, 2005 WL 3742804 (N.D.Tex. 2005); *Fromm v. MVM, Inc.*, 2004 WL 5355973 (M.D.Pa. 2004); *Wilson v. MVM, Inc.*, 2004 WL 765103 (E.D.Pa. 2004) (dismissal of ten year CSO employee); *Walton v. United States Marshals Service*, 2003 WL 23875599 (N.D.Cal. 2003) (dismissal of fourteen year CSO employee).

Gunnels sued Akal and the Attorney General under the ADA and the Rehabilitation Act.[10] The defendants defended the unassisted hearing test in *Gunnels*, relying on the same expert and many of the same arguments and documents subsequently proffered in the instant litigation. The district court ordered a jury trial, relying on the Fifth Circuit's decision in *EEOC v. Exxon Corporation*, 203 F.3d 871 (5th Cir. 2000). In *Exxon* the Fifth Circuit held that

> [i]n evaluating whether the risks addressed by a safety-based qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as the probability of occurrence.

203 F.3d at 875. In *Gunnels* (as in the instant case) the defendants had not met the Fifth Circuit standard.

> [T]he USMS has presented no evidence for the Court to consider the *Exxon* factors of business necessity such as ... the probability of occurrence, should a CSO with poor unaided hearing be allowed to work while wearing a hearing aid. The USMS states "[t]he inability to detect suspicious noises at the entrance may cause illegal contraband (i.e. guns, knives) to enter undetected," but the USMS fails to explain the probability of illegal contraband entering the building....

---

[10] *Gunnels v. Akal Security, Inc.*, Civil Action NO. V-02-132 (S.D.Tex.).

> The Court finds that there is a question of fact regarding ... the probability of occurrence of risks caused by allowing hearing aids in the workplace.

Gunnels v. Akal Security, Inc., 2004 U.S. Dist. LEXIS 31104 at *23-*24 (S.D.Tex.) The defendants subsequently settled *Gunnels* for substantial monetary relief. The United States' share of the settlement was $224,000; the amount paid by the private employer was not made public.

H. Terry Lee was hired as a Court Security Officer in 1996, during the era when the Marshals Service permitted CSOs to use hearing aids during the hearing test. Lee worked at the federal district court in Corpus Christi. In 2002 Lee was unable to pass a hearing test without use of his hearing aids; he was dismissed at the direction of the Marshals Service. Lee filed suit against Akal Security, Inc. and the Attorney General under the ADA and the Rehabilitation Act.[11] In March 2004 the defendants settled Lee's claim. The government's share of the settlement was $224,000; the amount paid by Akal was not made public.

Ramundo Ruiz was employed as a court security officer at the United States Courthouse in Victoria, Texas. In April 2006 Ruiz received the Distinguished District Award from the Director of the United States Marshals Service for his exemplary service. In October 2006, after he failed an unassisted hearing test, Ruiz was dismissed at the direction of the

---

[11] *Lee v. Akal Security, Inc.*, Civil Action NO. H-03-1752 (S.D.Tex.).

United States Marshals Service. Ruiz filed suit under the Rehabilitation Act.[12] The government moved for summary judgment on the grounds of business necessity, relying on the same expert, and essentially the same arguments and materials as in the instant case. After that motion was denied,[13] the case was tried to a jury. The district court's jury instruction regarding business necessity embodied the Fifth Circuit's *Exxon* standard.

> In evaluating whether the risks addressed by the standard constitute a business necessity, you should consider the magnitude of possible harm and the probability of occurrence.[14]

In response to special interrogatories the jury expressly rejected the government's business necessity defense. The district court subsequently denied the government's post trial motion for judgment as a matter of law, concluding that the evidence "supported the jury's finding that the decision of the Marshals Service to disqualify Plaintiff Ruiz from continuing to serve ... was not justified by business necessity."[15] The United States subsequently settled the *Ruiz* litigation for $750,000.

As part of the March 2004 settlements in *Gunnels* and *Lee*, the federal defendants agreed "to

---

[12] *Ruiz v. Mukasey*, NO. V-CA-07-56-H (S.D.Tex.).

[13] Order Regarding Defendant's Motion for Summary Judgment, Sept. 12, 2008, *Ruiz v. Mukasey*, Doc. 101.

[14] *Ruiz v. Mukasey*, Doc. 121 (Sept. 24, 2008).

[15] *Ruiz v. Mukasey*, 594 F.Supp.2d 738, 741 (S.D.Tex. 2008).

reevaluate the hearing standard for CSOs." The Marshals Service referred that obligation to the Committee on Security and Facilities of the Judicial Conference of the United States, which in 2005 referred it to the then newly created Committee on Judicial Security. In April 2007 the latter Committee decided to take no action on this matter, but instead to refer the issue back to the United States Marshals Service for resolution.[16] At some point following the *Gunnels* and *Lee* settlements the Marshals Service organized, but then cancelled, a meeting of audiologists to consider this problem.[17] We[18] are not aware of what other steps if any the Marshals Service may have taken to meet the government's obligations under those settlements.

(3) The Proceedings Below

Petitioner Allmond served for almost 30 years as a decorated police officer for the city of Columbus, Georgia, first as a patrol officer and later as a detective. During that career in law enforcement Allmond experienced no hearing-related problems, and was in fact unaware that his hearing might be imperfect. (App. 12a). In early 2003 Allmond applied to work as a CSO at the federal courthouse in Columbus, Georgia, and he was hired on April 1, 2003. CSOs

---

[16] Letter of David B. Sentelle to Hon. John F. Clark, Director, United States Marshals Service, April 30, 2007.

[17] R 7-154, Tr. of Hearing of Dec. 19, 2006, at 48.

[18] Counsel for petitioner represented the plaintiffs in both *Gunnels* and *Lee*.

for that federal courthouse are provided by Akal Security, Inc., a private firm under contract with the United States Marshals Service; Allmond was an employee of Akal. During the period that Allmond worked as a CSO at the federal courthouse he never used or owned a hearing aid.

Both before and after being hired Allmond took a series of hearing tests without use of a hearing aid. At least some of those test results did not meet the USMS unassisted hearing test standards. The USMS repeatedly deferred a final decision on whether Allmond satisfied the unassisted hearing standard, and permitted Akal to hire Allmond and employ him for a total of ten months.

In a letter dated February 2, 2004, however, the USMS notified Akal that Allmond did not meet the unassisted hearing requirement, and directed Akal to dismiss Allmond immediately. Allmond was fired by Akal on February 3, 2004. Allmond contacted a human resources officer for Akal and asked for an explanation of his dismissal. When he was told that the termination was based on the result of his hearing test, Allmond asked if he could use hearing aids. The Akal officer told Allmond that "[h]earing aids don't count."[19]

"It is undisputed that during the period that Allmond worked at the courthouse he did his job very well and never had any problems related to his

---

[19] R 4-80, Ex. K.

hearing or otherwise. Allmond never owned or wore hearing aids during his employment with Akal." (App. 16a-17a).[20] Neither Akal nor the USMS asserted that anyone in the courthouse even realized, as Allmond himself did not, that there was anything wrong with his hearing. The District Judge in Columbus wrote on Allmond's behalf.

> I am just surprised by the entire situation because I felt this CSO appeared to be in better physical shape than most of the other CSO's I see here and in Macon, and because I have had discussions with him on several occasions and he has never exhibited any problem in hearing what I had to say and responding appropriately.[21]

After a period of discovery the defendants moved for summary judgment on several grounds, including that the challenged unassisted hearing test was job-related and consistent with business necessity.[22] The

---

[20] Counsel for the defendants acknowledged that plaintiff's counsel "got Akal to admit they couldn't find a problem with his hearing up to the date he was disqualified. She got the government to admit that. There's no question about that." (R 7-154, at 18).

[21] R 5-104, Ex. W, at 6 (e-mail from Judge Clay Land to Terry Marrow, United States Marshals Service, Feb. 6, 2004).

[22] The defendants also urged that Allmond was not disabled under the terms of the ADA and the Rehabilitation Act. Allmond claimed the defendants regarded him as disabled, which would be sufficient under the terms of both laws. See 42 U.S.C. § 12102(2). The district judge denied summary judgment on that issue, concluding that

plaintiff acknowledged that a CSO must be able to hear to perform the essential functions of the job. The gravamen of the defendants' business necessity defense was that a hearing aid might malfunction or become dislodged at the precise moment when an emergency arose, impairing the hearing of the CSO, and leading to injury to judges, court personnel or others. The central dispute between the parties was whether the defendants were required, in order to establish safety-related business necessity, to establish the likelihood that such a safety-related series of events would actually occur.

The defendants argued that business necessity did not require evidence as to the likelihood that a particular safety-related problem would ever occur.[23] To establish business necessity, they insisted, a defendant need not adduce evidence as to "how often

---

> issues of fact remain for determination by a jury as to whether Defendants regarded Allmond as substantially limited in the major life activity of hearing.

(App. 29a). In addition, the defendants contended that Allmond was not a "qualified individual" and thus was not protected by the ADA. 42 U.S.C. § 12112(b)(6). The district court denied summary judgment on that ground as well, reasoning that

> except as to the hearing standard challenged by Allmond as unlawful, Defendants do not dispute that Allmond was qualified for the job.

(App. 38a).

The plaintiff also moved for summary judgment.

[23] R 7-154, at 33 ("[the plaintiff's counsel] couldn't cite a case that says you have to have a[n] epidemiological or statistical survey or peer reviewed [e]ssay to justify a screening mechanism.")

a CSO's hearing aid is going to fail."[24] All the law required, the defendants argued, is that an employer note that it is at least possible that the problem could arise. The defendant's Statement of Material Facts did not contain any assertion as to the frequency with which hearing aid problems actually occur, but asserted only that hearing aids are "*subject to* unexpected loss, malfunction, breakage, and battery failure" and "*may* be dislodged in physical confrontations."[25] The defendants did not contend that they had data – least of all conclusive data – as to how often hearing aids or hearing aid batteries break. "It may be a slight risk. I don't have a statistical basis for that, you know, I haven't done an epidemiology study."[26] The defendants candidly stated that their expert was unfamiliar with "'any studies or published articles' regarding the likelihood of mechanical failure in hearing aids, and was not aware of specific instances of failure."[27]

In the defendants' view they did not need any evidence, study or expert testimony about level of reliability of hearing, but could establish the business necessity defense simply by pointing out that

---

[24] R 5-107, Defendants' Reply to Plaintiff's Response to Defendants' Motion for Summary Judgment, at 9.

[25] R 3-75, Defendants' Statement of Material Facts, at 7 (emphasis added).

[26] R 7-154, at 29.

[27] R 5-102, Defendants' Response to Plaintiff's Statement of Facts, at 7.

> [e]very Tom, Dick and Harry knows that a hearing aid is a mechanical device. It's like your iPod, it's like your laptop, it can fail.

(R 7-154, at 33). The defendants' argument in support of this assertion was based on the broad assertion that *all* mechanical things can break.

> Just because no scientific survey says that "batteries fail unexpectedly" and "hearing aids (like any mechanical device) fail" does not mean that those assertions are "unsubstantiated." Indeed, such occurrences seem[ ] so obvious that judicial notice could be taken, much as the Judicial Conference apparently did.[28]

> [I]t is a simple fact of life that hearing aids, as mechanical devices, are subject to failure, as are their batteries.[29]

Allmond argued that the existence of a safety-related business necessity defense depends in part on the likelihood that the safety problem at issue will actually occur, and urged that an employer must adduce evidence as to the likelihood of that risk. Allmond expressly relied on the Fifth Circuit decision in *EEOC v. Exxon*.[30] Plaintiff emphasized that the defendants had presented "no evidence that a hearing

---

[28] R 5-107, Defendants' Reply to Plaintiff's Response to Defendants' Motion for summary Judgment, at 10.

[29] R 5-102, Defendants' Response to Plaintiff's Motion for Summary Judgment, at 13.

[30] R 7-154, at 43-44; R 4-99, Plaintiffs' Response to the Defendants' Motion for Summary Judgment, at 24.

aid has ever failed at a critical time for anyone in law enforcement, much less for a CSO."[31] Counsel for plaintiff noted that the defendants' expert had merely asserted in general terms that batteries and hearing aid components "can fail". (R 7-154, at 13-14). "That is not a scientific study.... [A]ny Tom, Dick and Harry, can say, well, yeah, something could happen, stuff happens." (R 7-154, at 13-14). "[T]his is an area in which data can be gathered, and [the defendant's expert] has not gathered it." (*Id.* at 16).

The district court concluded that the defendants were entitled to summary judgment with regard to their proffered business necessity defense. The district judge accepted the defendants' contention that proof of business necessity does not require any showing that there is a particular likelihood that the problem for which a disputed practice was designed will ever actually occur. The court reasoned that, in order to "show[ ] ... business necessity" an employer may simply rely on "'what if' thinking." (App. 42a). The employer need not offer any actual evidence that the hypothesized "what if" scenario is the least bit likely. The district court concluded that the challenged unassisted hearing test satisfied the business necessity standard regardless of whether the examination had been designed and adopted "based

---

[31] R 5-108, Plaintiff's Reply Brief in Support of His Motion for Partial Summary Judgment, at 6.

on events that may *never* occur." (App. 42a) (emphasis added). The district court granted summary judgment dismissing plaintiff's claims under both the ADA and the Rehabilitation Act.

The central issue on appeal, as in the district court, was whether employers are required as an element of a safety-related business necessity defense to establish that there is a significant risk of harm that would be avoided by application of a disputed qualification.[32] Allmond contended that the defendants were obligated to make such a showing.

> No one doubts that the ability to hear is important for Court Security Officers ... But the parties part company over the notion that *any* hypothetical risk means that an individual can be dismissed from [his or her] job no matter how competent [his or her] performance is.... [T]he legal standard is not whether there is a conceivable risk, but whether the risk is significant or substantial.[33]

Plaintiff urged the Eleventh Circuit to follow the Fifth Circuit decision in *EEOC v. Exxon* and the Third Circuit decision in *Verzeni v. Potter*, 109 Fed.Appx. 485 (3d Cir. 2004), which requires a

---

[32] The defendants also argued on appeal that the district court had erred in holding that there was sufficient evidence for a jury to find that the defendants regarded Allmond as disabled. The court of appeals did not address that issue.

[33] Reply Brief of Appellant Wilbur "Gene" Allmond, at 17, 21.

defendant to offer evidence of "the severity of the risk."[34]

The defendants insisted that proof of business necessity does not require evidence that there was in fact a substantial risk that the hypothesized problem would ever occur. The defendants did not argue that they had conclusively demonstrated that the probability of hearing aid failure is substantial or significant. The defendants contended only that hearing aids, "as mechanical devices", "can" or "may" fail.[35] Akal insisted that the defendants "need not have produced evidence of actual, prior hearing-aid failures."[36] Indeed, the defendants had conceded in the district court that they had no evidence that any problems related to hearing aids had ever arisen during the years when the CSOs included individuals who could only pass a hearing test using their hearing aids. The defendants took no position as to whether a hearing aid, assuming its batteries are changed on schedule, would fail once a week or

---

[34] *Id.* at 22 n.11, 24.

[35] Brief for the Attorney General, at 30 (certain circumstances "can" eliminate the effectiveness of a hearing aid; "there is always an unavoidable possibility of hearing aid malfunction or failure"), 32 ("malfunction and failure are inherent risks in mechanical devices such as hearing aids"); Brief on Behalf of Appellee Akal Security, Inc., at 34 (hearing aids ... may become dislodged, and their batteries may die), 44 (there is a "possibility that a hearing-aid will fail on the job") (emphasis omitted).

[36] Brief on Behalf of Appellee Akal Security, Inc., at 37 (capitalization omitted).

only once a century; on the defendants' view the difference was legally irrelevant. They urged that the mere fact that a hearing aid (like any mechanical device) could fail, no matter how unlikely that possibility, is sufficient by itself to establish the existence of business necessity.

The court of appeals affirmed on the grounds advanced by the defendants, holding that the mere fact that "hearing aids *may* malfunction, break, or become dislodged" suffices to establish the business necessity defense (App. 9a) (emphasis added). Under the court of appeals' decision no showing was required as to the actual likelihood that any of those events might ever occur. The court recognized that the dislodging, breakage or malfunction of a hearing aid would cause no harm unless they chanced to occur "at a critical moment" when some emergency was occurring. The Eleventh Circuit frankly acknowledged that the new unassisted hearing test could affect safety only in the context of "events that may never occur." (App. 9a n.7). But on the court's view the business necessity standard required only that there be any possibility – however unlikely – that a situation could arise in which the failure of a hearing aid coincided with the precise moment in time at which an emergency arose in which good hearing was essential.

Allmond filed a timely petition for rehearing en banc. The petition argued, inter alia, that the panel decision was inconsistent with the Fifth Circuit decision in *Exxon* and with the Third Circuit decisions in *Verzeni* and *Strathie v. Dept. of Transportation*, 716

F.2d 227 (3d Cir. 1983).[37] The court of appeals denied rehearing en banc. (App. 47a).

REASONS FOR GRANTING THE WRIT

I. THERE IS AN INTER-CIRCUIT CONFLICT REGARDING THE DEGREE OF RISK NECESSARY TO JUSTIFY THE EXCLUSION OF AN INDIVIDUAL WITH A DISABILITY

This case presents a question of recurring importance under the Americans with Disabilities Act, the Rehabilitation Act, and Title VII of the Civil Rights Act. All of these statutes prohibit the use of certain job qualification standards that have a discriminatory effect on the individuals protected by the act in question. Such qualifications may be deemed lawful if they are "necessary to safe ... job performance." *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1977). The court below, like other courts of appeals, has recognized that the standards under these three statutes are the same. (App. 7a n.6, 39).

For decades prior to the decision in the instant case the courts of appeals had held – under all three statutes – that the availability of a safety-based justification depends in part on the likelihood that employment of the worker in question would result in

[37] Petition for Rehearing En Banc of Appellant Wilbur "Gene" Allmond, at 10, 13, 14.

injury to others or to himself. In the instant case the Eleventh Circuit, at the urging of the United States, has held to the contrary that an employer can successfully defend a discriminatory qualification merely by showing that a potentially dangerous situation "may" occur, without offering evidence as to the likelihood that a situation will ever arise in which that employment of that individual would in fact result in harm.

A. The Americans With Disabilities Act

In the Fifth Circuit proof of business necessity requires more than a bare showing that a potentially dangerous situation "may" occur.

> In evaluating whether the risks addressed by a safety-based qualification standard constitute a business necessity, the court should take into account the magnitude of possible harm as well as *the probability of occurrence*. The acceptable *probability* of an incident will vary with the potential hazard posed by the particular position; a *probability* that might be tolerable in an ordinary job might be intolerable for a position involving atomic reactors, for example.

EEOC v. Exxon Corp., 203 F.3d 871, 875 (5th Cir. 2000) (emphasis added).[38] This requirement is codified in the

---

[38] The federal government expressly permits the individuals who guard the nation's atomic reactors to wear hearing aids when taking the required hearing test. 10 C.F.R. Pt. 73, App. B, part I(B)(2)(b).

Fifth Circuit Pattern Jury Instructions, which direct a jury "[i]n evaluating whether the risks addressed by the standard constitute a business necessity" to consider "[t]he probability of occurrence."[39] Utilizing the standard in *Exxon*, district courts in the Fifth Circuit have repeatedly rejected government summary judgment motions in cases challenging under the ADA and Rehabilitation Act the very medical qualification at issue in this case. Thus different legal standards apply to claims regarding CSOs at the federal courthouse in Gulfport, Mississippi and to claims regarding CSOs at the federal courthouse in Mobile, Alabama, only 75 miles to the East. Petitioner repeatedly urged the Eleventh Circuit to adopt the Fifth Circuit's *Exxon* standard.

The Ninth Circuit has expressly adopted the Fifth Circuit's *Exxon* rule as establishing the standard for showing the business necessity of a safety-based qualification. *Bates v. United Parcel Service*, 511 F.3d 974, 996 (9th Cir. 2007) (en banc) (quoting *Exxon*). The Ninth Circuit emphasizes that "[t]he 'business necessity' standard is quite high, and is not to be confused with mere expediency" 511 F.3d at 996 (quoting *Cripe v. City of San Jose*, 261 F.3d 877, 890 (9th Cir. 2001)).

---

[39] Pattern Civil Jury Instruction 11.7.4 ADA-Business Necessity Defense, available at http://www.lb5.uscourts.gov/juryinstructions.

B. The Rehabilitation Act

The Rehabilitation Act generally forbids excluding an individual on the basis of disability from federal employment, or employment in a federally assisted program, if he or she is "otherwise qualified." 29 U.S.C. § 504(a). Unlike the Eleventh Circuit in the instant case, four circuits have held that such a showing of a lack of qualification under the Rehabilitation Act requires a demonstration that the risk which that exclusion avoids is a substantial one.

The Ninth Circuit has repeatedly rejected the suggestion that any increase in risk, no matter how small, is sufficient under the Rehabilitation Act to justify a safety-related qualification that excludes individuals with a disability. In *Bentivegna v. United States Department of Labor*, 694 F.2d 619 (9th Cir. 1982), the Secretary of Labor had rejected a claim under the Rehabilitation Act of an individual who had been dismissed because he had diabetes and an elevated blood sugar level. The Secretary reasoned that those circumstances demonstrated that Bentivegna was not qualified because he was "more prone to serious infections." 694 F.2d at 622. The Ninth Circuit overturned the Secretary's decision, insisting that proof of a more significant degree of increased risk was required.

> Any qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at greater risk from

> work-related injuries.... [T]he [defendant] bore the burden of proving that [its exclusion standard] contributes cognizably to personal health and safety.

Id.

In *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985), an unsuccessful applicant sued the Postal Service after she was denied employment because she suffered from epilepsy. The district court had dismissed her complaint, reasoning that "an employer is justified in not employing a handicapped person if he or she presents 'an elevated risk' of injury." 767 F.2d at 1421. The court of appeals reversed, holding that a mere "elevated risk" was insufficient to demonstrate that an individual was not qualified.

> This court's opinion in *Bentivegna* cannot fairly be interpreted as holding that an elevated risk of injury, without more, is sufficient to justify the refusal to hire an otherwise handicapped person.

767 F.2d at 1422.

> [I]n some cases, a job requirement that screens out qualified handicapped individuals on the basis of possible future injury is necessary. However, we hold that in order to exclude such individuals, there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports.

> The question is whether, in light of the individual's work history and medical history, employment of that individual would pose *a reasonable probability of substantial harm*.

Id. (emphasis added).

The Seventh Circuit has expressly adopted the Ninth Circuit standard in *Mantolete*. *Knapp v. Northwestern University*, 101 F.3d 473, 483 (7th Cir. 1996) (quoting *Mantolete*; "[w]e agree this is the appropriate standard").

> A significant risk of ... physical injury can disqualify a person from a position if the risk cannot be eliminated.... But more than merely an elevated risk of injury is required before disqualification is appropriate. Any physical qualification based on risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented, since almost all disabled individuals are at a greater risk of injury.

101 F.3d at 483.

In *Strathie v. Department of Transportation*, 716 F.2d 227 (3d Cir. 1983), the defendant utilized a qualification standard similar to that in the instant case; individuals who applied for a license to operate a school bus were required to pass a hearing test without a hearing aid. 716 F.2d at 228. The plaintiff, like the plaintiff in the instant case, challenged that uncorrected hearing test rule under the Rehabilitation Act. The Third Circuit held that the

plaintiff was qualified if, with or without some form of accommodation, he could perform the job of a school bus driver without "appreciable risk." 716 F.2d at 232-33. The defendant, like the defendant in the instant case, argued that hearing aids pose a risk of failure simply because they are mechanical devices.

> [T]he Department of Transportation points out that a hearing aid, like any other active mechanical device, is subject to sudden mechanical failure. This might occur, for example, if a hearing aid battery were to wear out.

716 F.2d 233. The court of appeals held that such a general argument was insufficient to demonstrate that Strathie was unqualified, particularly in light of the steps that could be taken – such as regularly checking the hearing aid batteries – to reduce any risk. *Id.* The defendant also urged that reliance on hearing aids was risky because "hearing aids can become dislodged." 716 F.2d at 232. The Third Circuit held that generalized assertion insufficient, particularly in light of evidence that some forms of hearing aids were less likely to be dislodged. The court also noted that (as in the instant case) the defendant permitted individuals to use glasses when taking a vision test, even though glasses also can be dislodged.[40] The court of appeals sustained Strathie's

---

[40] 716 F.2d at 732:

> That such an individual is allowed to obtain a school bus driver's license indicates that the Department

claim, holding that he had demonstrated that he was qualified to be a school bus driver.

In *Verzeni v. Potter*, 109 Fed.Appx. 485 (3d Cir. 2004), the Third Circuit held that where a defendant asserts a business necessity defense in an action under the Rehabilitation Act, the trier of fact must consider the likelihood, not merely the possibility, that injury would result in the absence of the disputed job qualification.

> [A] factfinder must face the same concerns that the Supreme Court addressed in [*School Board of Nassau County v.*] *Arline*[, 480 U.S. 273 (1987),] about the nature of the risk, the duration of the risk, the severity of the risk, and the probabilities that the disability will cause harm.

109 Fed.Appx. at 491. In the Third Circuit jurors are to be instructed that they must consider all of these factors, and that "they should not simply defer their individual judgments to health professionals." 109 Fed.Appx. at 493.

The Fifth Circuit holds that under sections 501 and 504 of the Rehabilitation Act

> an individual is not qualified for a job if there is a genuine *substantial* risk that he or she could be injured or could injure others, and the employer cannot modify the job to eliminate that risk.

---

views some safety risks as too remote to justify the denial of a school bus driver's license.

Chiari v. City of League City, 920 F.2d 311, 317 (5th Cir. 1991) (emphasis added).

C. Title VII

The courts below noted that the business necessity standard under the ADA and under Title VII are presumed to be the same, and relied on Title VII cases in determining the controlling legal standard. (App. 7a n.6, 39).

The Fourth Circuit has repeatedly held that under Title VII a safety-related claim of business necessity requires a demonstration that the challenged qualification standard was necessary to avoid "significant risks." *EEOC v. Service News Co.*, 898 F.2d 958, 962 (4th Cir. 1990); *Wright v. Olin Corp.*, 697 F.2d 1172, 1190 (4th Cir. 1982). The Seventh Circuit requires the defendant to prove that in the absence of the disputed standard there would be a "substantial risk" of harm. *International Union, United Automobile, etc., Workers of America v. Johnson Controls*, 886 F.2d 871, 886 (7th Cir. 1989) (en banc), *reversed on other grounds*, 499 U.S. 187 (1991).

The Eighth Circuit has repeatedly held that "[a] neutral employment practice may be justified by business necessity only if the practice not only fosters safety ... but is essential to that goal." *EEOC v. Rath Packing Co.*, 787 F.2d 327-38 and n.10 (8th Cir. 1986); *Green v. Missouri Pacific R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975). The Fourth, Fifth and

Ninth Circuits have also adopted that distinction. *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 564 n.40 (5th Cir. 1988); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1289 (9th Cir. 1981); *Rock v. Norfolk & W. Ry. Co.*, 473 F.2d 1344, 1349 (4th Cir. 1973).

II. THE QUESTION PRESENTED IS OF SUBSTANTIAL IMPORTANCE

The question presented strikes at the very heart of the ADA and the Rehabilitation Act. As the court of appeals correctly observed in *Bentivegna*, "almost all handicapped persons are at greater risk from work-related injuries." 694 F.2d at 622. A substantial portion of all individuals with disabilities could be denied employment if, as the Eleventh Circuit held, business necessity under the ADA and the Rehabilitation Act can be established merely by suggesting that there is a possibility, no matter how slight, that a situation "may" arise in which the employment of a disabled worker could lead to injury.

Similarly, in many common occupations the actions of one employee could impact the safety of others: factory workers, construction workers, drivers, teachers, and countless others. It would often be possible to imagine some far-fetched scenario that "may" occur in which a particular disability could result in injury to others. Under the Eleventh Circuit standard an employer's ability to hypothesize such a situation would be sufficient to justify dismissing

or refusing to hire countless individuals with disabilities.

The decision below is contrary to the EEOC's longstanding interpretation of the ADA. Since 1991 it has been the Commission's view that when an employer asserts that a disputed qualification requirement is justified under the ADA by safety-related business necessity, the employer must demonstrate that the requirement meets the "direct threat" standard in section 103(b) of the ADA. 42 U.S.C. § 12113(b). A showing of such a direct threat requires a demonstration that there is "a significant risk to the health or safety of others." 42 U.S.C. § 12111(3). In *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 569 (1999), the Solicitor General advanced this very interpretation of the standard for a showing of safety-related business necessity under the ADA.[41]

---

[41] Brief for The United States and the Equal Employment Opportunity Commission As Amicus Supporting Respondent, at 8 ("A qualification standard ... must be justified under the ADA in terms of job-relatedness and consistency with business necessity. In the case of qualification standards that are based on a safety rationale, that requires an inquiry into whether respondent would pose a 'direct threat' to the health o[r] safety of himself or others"), 22 ("The ADA requires safety-based standards to be shown to be necessary to avoid a direct threat to health or safety") (capitalization omitted), 23 (a "significant risk" is required).

This Court did not resolve whether a showing of safety-related business necessity under the ADA requires that an employer meet the direct threat standard. *Albertson's*, 527 U.S. at 569 n.15.

The interpretation of business necessity advanced by the government in the courts below is inconsistent with the manner in which the ADA has been enforced by the Civil Rights Division of the Department of Justice. On several occasions the Civil Rights Division has successfully objected to the practice of local law enforcement agencies of requiring police officers to pass an unassisted hearing test. In 2002 and 2003, the Civil Rights Division negotiated settlement agreements under the ADA with the Honolulu Police Department and the Cobb County, Georgia Police Department in which both departments agreed to end their practice of requiring police officers to pass an unassisted hearing test. Both settlement agreements recited that "[t]he United States alleges" the use of an unassisted hearing test for police officers is not "consistent with business necessity."[42] It is impossible to understand how a qualification not required by business necessity for police officers could nonetheless be warranted by business necessity for court security officers.

---

[42] Settlement Agreement Between the United States of America and the Honolulu Police Department, p. 1, par. 4; Settlement Agreement Between the United States of America and Cobb County, Georgia, p. 2 par. 7. (R 5-101, Ex. P). The Honolulu Police Department Agreement recited that

> [i]n support of this allegation, the United States relies, in part, on the presence of incumbent police officers employed by HPD who use a hearing aid to attenuate hearing loss and effectively meet their employment responsibilities.

Those are essentially the facts of the instant case.

The Eleventh Circuit's decision cannot be reconciled with this Court's interpretation of the Rehabilitation Act in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987). In *Arline* the employer asserted that the plaintiff was not qualified to work as a school teacher because she had had tuberculosis. The Court held that the plaintiff would be unqualified only if her employment would "expos[e] others to *significant* health and safety risks." 480 U.S. at 287 (emphasis added). "A person who poses a *significant* risk ... will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." 480 U.S. at 287 n.16. The assessment of an individual's qualification must consider not only "the severity of the ... potential harm to third parties," but also "the probabilities the disease will be transmitted and will cause varying degrees of harm." 480 U.S. at 288. Under *Arline* an individual is not unqualified merely because employing that individual "may" result in harm to others; there must be a determination as to how likely that injury really is.[43] Because the district court in *Arline* had held the plaintiff not qualified without making findings "as to the probability that she would transmit the disease," this Court remanded the case for further findings on those issues. 480 U.S. at 288-89.

---

[43] The defendant in *Arline* suggested that a worker who had had tuberculosis posed a risk to others, and was thus unqualified, regardless of the magnitude of that risk. Brief for Petitioners, *School Board of Nassau County v. Arline*, at 39 ("notwithstanding Respondent's attempts to characterize the risk of contagion as minimal, that risk is nevertheless real.")

If under the Rehabilitation Act the legality of a job qualification turns on the likelihood that that qualification is needed to avoid harm, the same must be true of the business necessity defense in the ADA. Section 501 of the ADA, 42 U.S.C. § 12201(a), provides that "[e]xcept as otherwise provided in this Act, nothing in this Act shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973." The business necessity defense in sections 102(b)(6) and 103(a) of the ADA, 42 U.S.C. §§ 12112(b)(6) and 12113(3), cannot authorize the exclusion of an individual who would be "qualified" under, and thus protected by, the Rehabilitation Act. Because consideration of the probability of a risk is required in a determination of qualification under the Rehabilitation Act, it is also mandatory under the ADA.

III. THIS CASE PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

The decision in the instant case turned on the difference between the indulgent Eleventh Circuit standard and the standard applied by other circuits. The courts below did not suggest, and the defendants never claimed, that the defendants had offered conclusive evidence – sufficient to meet the standard on summary judgment – that the risk asserted by the defendants was substantial or significant, or even that the defendants had proffered conclusive evidence of what that level of risk might be. The only issue

regarding which there was no genuine issue of material fact was that there "can" or "may" be a situation in which injury might result from employing a CSO who needed a hearing aid to pass the CSO hearing test. That truly minimal showing would be insufficient to permit summary judgment in the Third, Fourth, Fifth, Seventh, Eighth or Ninth Circuits.

There is compelling evidence in this case that any such risk would be exceptionally small. Plaintiff introduced expert testimony that hearing aids rarely fail.[44] There was undisputed evidence that security and safety emergencies in the federal courts are extremely uncommon. A study prepared by the primary author of the CSO Medical Standards concluded that a federal court security officer is likely to use physical force less than once in his or her entire career. The use of a firearm by a court security officer is so rare that the study could not even calculate its frequency.[45] Of course any such emergency, however rare, must be dealt with effectively. But, as the court below acknowledged, the employment of a security officer who needed a hearing aid could not reduce security unless the hearing aid happened to fail at precisely "the critical moment" when such an uncommon emergency arose. (App. 9a n.8). Even that unlikely coincidence in time would not matter unless the incident – unlike, for

---

[44] R 4-80, Ex. J, at 2.

[45] R 4-78, Ex. 3-3, at 9.

example, the need to stop a courthouse visitor who ran past the screeners – was one in which the level of the CSO's hearing mattered. In short, it is exceedingly unlikely that employing a CSO such as Allmond will ever lead to any form of injury.

There was also compelling evidence that actually employing CSOs who need hearing aids to pass a hearing test has never resulted in any harm. Akal itself pointed out in 2001 that "many CSOs use hearing aids," and that a significant portion of them could not pass an unassisted hearing test.[46] Yet the defendants acknowledged that during the period prior to 2001 when hearing tests for court security officers could be taken with a hearing aid there were no instances in which a court security officer anywhere in the nation was unable to respond to an emergency because of a problem with a hearing aid.[47] Indeed, the defendants conceded that they could not identify a single incident in which a hearing aid problem had ever impaired the performance of any federal,

---

[46] R 4-80, Ex. N, at 2-3. Akal noted that an estimated 60% of current CSOs could not meet the new Medical Standard, and that this was "primarily due to results from the audiometer, hypertension conditions and color vision."

[47] R 4-81, Plaintiff's Statement of Facts Regarding His Motion for Partial Summary Judgment, at 18 ("Akal has stipulated with Allmond that 'Akal is not aware of any incidents where one of its CSO's who wore a hearing aid failed to perform his duty because of difficulty with his hearing aid.' "). The defendants did not contest this statement. R 5-102, Defendants' Response to Plaintiff's Statement of Facts, at 4.

state or local law enforcement officer.[48] That was particularly significant because the defendants acknowledged that there was no evidence that other law enforcement agencies had required their employees to pass an unassisted hearing test.[49] Although federal law would require a report to the Food and Drug Administration if there were an injury or death as a result of the failure of a hearing aid, the government did not contend it had ever received such a report.[50]

If employing law enforcement officials who need a hearing aid to pass a hearing test entailed a significant risk, that danger would presumably have been widely recognized by agencies other than the Marshals Service. The defendants, however, identified no such agency which applies an unassisted hearing test requirement. To the contrary, the United States itself routinely permits the use of hearing aids for hearing tests for federal jobs at least as dangerous

---

[48] The Plaintiff's Statement of Facts Regarding His Motion for Partial Summary Judgment noted that "[n]either Akal nor the Government have produced any evidence that hearing aids have ever caused impaired performance of duties in the history of law enforcement in the United States." (R 4-81, at 9, par. 49). The defendants did not contest the correctness of that statement. R 5-102, Defendants' Response to Plaintiff's Statement of Facts at 9.

[49] Counsel for the defendants agreed that "there is not a scintilla of evidence that this practice ... is used down the street at ... the state courthouse, or the sheriff's department." (R 7-154, at 30). More generally, defense counsel stated "nobody else has this standard. That's exactly right." (*Id.* at 59).

[50] R 5-101, Ex. J-1 at 2; R 7-154, at 49.

and safety-sensitive as a courthouse security officer. For example, the Department of Justice allows hearing-aid assisted testing for guards at the Federal Bureau of Prisons.[51] The federal judiciary permits the use of hearing aids by individuals taking a hearing test to work as probation officers.[52] Prison guards and probation officers must deal with convicted federal offenders in circumstances less secure than a federal courthouse. If unassisted hearing tests are not necessary for the federal corrections officers at the federal supermax prison in Florence, Colorado, those tests cannot be required by business necessity for the CSOs who screen visitors to the federal courthouse in Columbus, Georgia.

---

[51] See http://www.bop.gov/policy/progstat/3906_019.pdf

[52] See http://www.uscourts.gov/fedprob/officer/medicalrequirements.html

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, Washington 98195
(206) 616-3167

JOHN GRIFFIN
MAREK, GRIFFIN & KNAUPP
203 North Liberty Street
Victoria, Texas 77901
(361) 573-5500

KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Boulevard
Houston, Texas 77008
(713) 526-5677

Counsel for Petitioner

**Counsel of Record*

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FILED
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEBRUARY 20, 2009

THOMAS K. KAHN
CLERK

No. 07-15561

D. C. Docket No. 05-00096-CV-HL-4

WILBUR ALLMOND,
a.k.a. Gene Allmond,

Plaintiff-Appellant,

versus

AKAL SECURITY INC.,
ERIC HOLDER, Attorney
General of the United States,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(February 20, 2009)

Before EDMONDSON, Chief Judge, BLACK and PRYOR, Circuit Judges.

PER CURIAM:

Wilbur Allmond appeals the district court's grant of summary judgment to Akal Security Inc. and the Attorney General on his discrimination claims under the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*. Believing that the affirmative business-necessity defense applies here, we affirm the judgment.

BACKGROUND

The United States Marshals Service is responsible for securing the federal courts. 28 U.S.C. § 566(a). To fulfill that mission, the Marshals Service contracts with private companies, like Akal Security, to provide security officers at federal courthouses. Those officers perform a variety of protective services, such as guarding courthouse entrances, maintaining a security presence in courtrooms, and responding to emergency situations. Akal Security employed Allmond as a security officer at the federal courthouse in Columbus, Georgia.

A. The Marshals Service Requires Security Officers to Pass a Hearing Test Without the Help of a Hearing Aid

After the bombing of the federal building in Oklahoma City, Oklahoma, and in response to judicial concern with the physical capability of security officers to respond to security threats and other

emergency situations, the government reviewed the security officer position. Dr. Richard Miller, then Director of Law Enforcement Medical Programs for the Office of Federal Occupational Health, conducted the study. In doing so, Dr. Miller visited five federal courthouses where he observed officers on the job, conducted focus groups with officers, and interviewed judges and Marshals Service personnel about the position.

Dr. Miller reported his findings in 2000. He identified several hearing-related tasks that are essential to the security officer position: comprehending speech during face-to-face conversations, over the telephone, over the radio, and outside the range of sight; hearing sounds that require investigation; and localizing sound. He concluded that officers must "be able to clearly understand directions in times of crisis[,] . . . must be able to hear communication at a level of sound that does not inform persons causing an incident of the [officers'] response plans[,] . . . [and] must be able to discern the direction of a disturbance or detect an approaching threat (sound localization)." According to Dr. Miller, these skills are integral to "[t]he safety of the federal judiciary, court personnel, and the public. . . ."

To guarantee that all security officers can adequately perform their job, Dr. Miller recommended changes to the medical standards for the position. Among the changes, he suggested that all officers (officers may wear hearing aids on the job) pass a hearing test without the help of a hearing aid

– a hearing-aid ban during testing – to qualify for the position.[1] According to Dr. Miller, this hearing-aid ban would ensure that all officers can perform effectively in the event their hearing aids experience interference, become dislodged, or otherwise fail on the job. The Marshals Service implemented many of Dr. Miller's recommendations, including the hearing-aid ban.

B. Allmond Fails His Hearing Test

As a new security-officer applicant, Allmond was required to take a preemployment medical examination, which included a hearing test subject to the hearing-aid ban. He failed the test.[2] At the suggestion of the Marshals Service, he underwent additional testing and submitted additional medical information.

Nevertheless, even after doing so, he remained disqualified due to his "decreased ability to distinguish speech in the absence of background noise. . . ." The Marshals Service notified Akal Security of the situation; and Akal Security, as it was required to do

---

[1] Security officers are subject to pre-employment and annual medical examinations. An officer who fails his examination is often allowed to supplement his medical record before a final determination is made. If the officer is still disqualified after doing so, he must be replaced.

[2] Allmond did not use a hearing aid before or during his employment with Akal Security.

under its contract with the Marshals Service, terminated Allmond's employment.

C. Allmond Sues Akal Security and the Attorney General

Allmond sued Akal Security and the Attorney General. Allmond claimed that the hearing-aid ban discriminates against disabled persons in violation of the Rehabilitation Act and the ADA. He sought damages, reinstatement, and an order prohibiting the Marshals Service from continuing the ban.

The district court granted summary judgment to Akal Security and to the Attorney General. Although the district court found a genuine issue of material fact on whether Allmond is disabled under federal law, the district court concluded that the hearing-aid ban is a lawful business necessity. Allmond appeals.

STANDARD OF REVIEW

We review *de novo* an order granting summary judgment. *Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006). In doing so, we view "the evidence and all reasonable inferences drawn from it in the light most favorable to the nonmoving party." *Battle v. Bd. of Regents*, 468 F.3d 755, 759 (11th Cir. 2006). We will affirm summary judgment only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

DISCUSSION

In this appeal, we focus our attention solely on the affirmative business-necessity defense and its application to the hearing-aid ban. We express no view on whether Allmond is disabled under federal law and just assume that he is disabled for the sake of discussion.

The Rehabilitation Act and the ADA prohibit an employer from applying a qualification standard that screens out or tends to screen out disabled persons.[3] *See* 42 U.S.C. § 12112(b)(6). But these laws also afford an employer an affirmative business-necessity defense to claims challenging the application of an otherwise problematic standard.[4] *See* 42 U.S.C. § 12113(a). The parties rely on those competing provisions here: Allmond says that the hearing-aid ban unlawfully[5] precludes certain disabled persons

---

[3] Because the same standards govern discrimination claims under the Rehabilitation Act and the ADA, we discuss those claims together and rely on cases construing those statutes interchangeably. *Cash v. Smith*, 231 F.3d 1301, 1305 n.2 (11th Cir. 2000).

[4] Section 12113(a) uses these words: "It may be a defense to a charge of discrimination . . . that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter."

[5] At summary judgment, Allmond challenged only the hearing-aid ban; he said nothing about the other components of

(Continued on following page)

from serving as security officers; Akal Security and the Attorney General, on the other hand, contend that the ban is a lawful business necessity.

To benefit from the affirmative defense, an employer must prove that the pertinent qualification standard is job-related and consistent with business necessity. *Id.* Although this burden is generally quite high, it is significantly lowered when, like here, "the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great. . . ."[6] *Hamer v. City of Atlanta*, 872 F.2d 1521, 1535 (11th Cir. 1989) (internal quotation marks omitted). Once an employer demonstrates that the pertinent qualification standard is job-related and consistent with business necessity, the burden shifts to the plaintiff to offer a reasonable accommodation that would allow him to satisfy that standard. *Moses v. Am. Nonwovens, Inc.*, 97 F.3d 446, 447 (11th Cir. 1996) ("The employee retains at all times the burden of persuading the jury . . . that reasonable accommodations were available."); *see also Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1367 (11th Cir. 2000).

---

the unaided hearing test and, therefore, may not do so now. *See Onishea v. Hopper*, 171 F.3d 1289, 1305 (11th Cir. 1999).

[6] In defining the scope of the affirmative business-necessity defense under the Rehabilitation Act and the ADA, we look to cases analyzing the defense under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

We, therefore, begin by reviewing the hearing-aid ban for job-relatedness and business necessity. Some courts treat these terms as synonymous, but they are actually distinct pillars of the affirmative defense. As this Court has explained, "[j]ob[-]relatedness is used in analyzing the questions or subject matter contained in a test or criteria used by an employer in making hiring or promotional decisions." *Hamer*, 872 F.2d at 1533. Business necessity, in contrast, "is larger in scope and analyzes whether there is a business reason that makes necessary the use by an employer of a test or criteria in hiring or promotional decision making." *Id.* The hearing-aid ban meets both criteria.

The hearing-aid ban is job-related. In response to judicial concern, the government sponsored a detailed analysis of the security officer position to identify the essential functions of the job and the medical qualifications necessary to perform it. As a result of that study, the government concluded that officers must possess a certain level of unaided hearing to perform those functions adequately at all times. To guarantee that all security officers have that required hearing, the Marshals Service – at the recommendation of the doctor conducting the study – adopted the hearing-aid ban. Based on these facts alone, we believe that the ban is sufficiently tailored to the security officer position to satisfy this element of the defense.

The hearing-aid ban is also consistent with business necessity. As we noted at the outset, the

Marshals Service is entrusted to protect the federal courts and relies heavily on security officers to carry out this duty. Because hearing aids may malfunction, break, or become dislodged,[7] the Marshals Service adopted the ban to ensure that all officers can perform their jobs safely and effectively in the event they must rely on their unaided hearing.[8] When considered in the light of the tremendous harm that could result if a security officer could not perform the essential hearing functions of his job at a given moment, we accept this justification as legitimate and wholly consistent with business necessity.

The burden, thus, shifts to Allmond to offer a reasonable accommodation that would allow him to pass the hearing test without the help of a hearing aid. But his only suggestion is to remove the hearing-aid ban entirely. That proposal is not reasonable: it destroys the very standard we have just upheld as a legitimate business necessity. We, therefore, reject Allmond's proposal and conclude that the affirmative

---

[7] Allmond heavily criticizes this justification as based on events that may never occur. But neither the ADA nor the Rehabilitation Act requires employers to forgo a qualification standard "until a perceived threat becomes real or questionable behavior results in injuries." *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999).

[8] Allmond's own witness conceded that a security officer who cannot hear certain sounds at a critical moment due to hearing-aid failure would present an unacceptable risk to the safety of others.

business-necessity defense bars Allmond's claims in full. Summary judgment was proper.

CONCLUSION

We affirm the judgment of the district court.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA COLUMBUS DIVISION

WILBUR ALLMOND,	:	
Plaintiff,	:	
v.	:	
AKAL SECURITY, INC. and ALBERTO GONZALES, Attorney General of the United States,	:	Civil Action No. 4:05-cv-96(HL)
Defendants.	:	

ORDER

This matter is before the Court on the Motion for Summary Judgment (Doc. 74) of Defendants Akal Security, Inc. and Alberto Gonzales, Attorney General of the United States, in his official capacity, and the Motion for Partial Summary Judgment (Doc. 80) of Plaintiff Wilbur Allmond. The Court heard oral argument on the Motions on December 19, 2006. After consideration of the pleadings, depositions, answers to interrogatories, admissions, and affidavits, and the arguments of the parties, and as more fully set forth below, the Court grants the Motion of Defendants and denies the Motion of Plaintiff.

I. FINDINGS

From April 1, 2003, until February 3, 2004, Wilbur Allmond was employed as a Court Security

Officer ("CSO") by Akal Security, Inc. ("Akal"). Akal is a contractor to the United States Marshal's Service ("USMS"), and provides CSOs for the federal courthouses within the Eleventh Circuit. At the time of the events giving rise to this suit, Allmond was a CSO at the federal courthouse in Columbus, Georgia.

At the time he went to work for Akal, Allmond was 55 years-old. Before working at Akal, Allmond had worked as a law enforcement officer, accumulating 36 years of law enforcement experience. Allmond was not aware of having any hearing problems during his time as a law enforcement officer and did not wear hearing aids at the time he applied to work at Akal. (Allmond Dep. at 15, Doc. 128.)

As a new applicant at Akal, Allmond was required to take a medical examination, which included a hearing test. Since January of 2001, the USMS has required that its CSOs meet the hearing requirements of the physical exam without the use of hearing aids. (Pl.'s Resp. Defs.' Statement Material Facts ¶ 41, Doc. 97.) However, the USMS allows its CSOs to use hearing aids on the job. (*Id.* ¶ 42.) CSOs who wear hearing aids and who pass the hearing test unaided must have their aided tests reviewed to ensure that the CSOs' hearing aids are functioning. (Id. ¶ 43.)

At the time that Allmond took his physical exam, the initial threshold requirements were as follows[1]:

> Initially all CSOs are tested UNAIDED using a pure tone, air conduction audiogram (audiometer) for measurement, testing each ear separately. . . .
>
> (i) In the frequency range from 500-2000 hertz (Hz), the pure tone audiometric deficit must not exceed 30 decibels (dB) in either ear, without the use of hearing aids.
>
> (ii) At 3000 Hz, the pure tone audiometric deficit must not exceed 40 dB in either ear, without the use of hearing aids.
>
> (iii) At 4000 Hz, the pure tone audiometric deficit must not exceed 50 dB in either ear, without the use of hearing aids.

(Pl.'s Summ. J. Evid. Doc. 101-4 at 1.) If the unaided pure tone audiogram is failed and the applicant does not wear a hearing aid, the applicant must undergo

---

[1] Under the heading "Current Government Qualification Standard for Hearing" (Pl.'s Summ. J. Evid., Doc. 101-1, Ex. C.), Allmond has offered a document labeled as "modification M032." (*Id.*) Defendants' witness, Marc A. Farmer, states in his Declaration, "On December 18, 2002, the USMS issued contract modification No. M032, which spelled out in great detail the hearing standards and protocols that had been utilized since the beginning of the revised medical program." (Defs.' Evid. Materials, Doc. 78-2 ¶ 14.) The Court will assume, therefore, that Modification M032 states the standard in place at the time Allmond took his physical exam.

unaided functional hearing assessments. (*Id.* at 2.) The requirements for the functional hearing tests are as follows:

> (i) Unaided hearing loss between the two ears must not differ by 25 dB or more at three of the four speech frequencies, i.e., 500, 1000, 2000, and 3000 Hz. (Measures the ability to localize sounds.)
>
> (ii) Unaided Speech Reception Threshold must be 30 dB or better in at least one ear. (Measures the ability to hear sounds that alert to danger.)
>
> (iii) Unaided Speech Recognition in quiet must be 90% or above in each ear.
>
> (iv) Unaided Speech Recognition in a noise sound field must be 50% or above.

(*Id.* at 2-3.) Under the standards in place, an applicant could have moderate hearing loss and still work as a CSO as long as he or she met the hearing standards unaided. (Pl.'s Summ. J. Evid., Doc. 101-9 at 39.) An applicant who could not meet the hearing standards without the use of hearing aids would not be allowed to work. (*Id.* at 39-41.)

Allmond completed the medical examination, including the hearing test, on February 1, 2003. Immediately following the examination, Allmond was told by the examining physician that he did not do well on the hearing portion of the test. (Allmond Dep. at 16.) That was the first time Allmond became aware that he had a hearing problem. (Allmond Dep. at 15,

63-64.) In completing the hearing portion of the examination, the examining physician noted, "The examinee does not wear a hearing aid." (Pl.'s Summ. J. Evid., Doc. 104-7 at 12.) In the Examination Summary, the physician noted the following under the heading "Significant Findings": "Patient's hearing exam seems to be suboptimal according to written guidelines provided in this pamphlet." (Pl.'s Summ. J. Evid., Doc. 104-8 at 4.)

Allmond's medical examination was reviewed by the Judicial Security Division on February 25, 2003. Following that review, Allmond's status was given as "medical determination deferred pending further documentation." (Defs.' Materials Supp. Mot. Summ. J., Doc. 78-23 at 9.) Allmond was advised that his pure tone audiogram did not meet the required standards. He was further advised to see an ear, nose and throat physician for additional testing. (*Id.*)

Allmond provided supplemental medical information on March 26, 2003. (*Id.* at 11.) The supplemental medical information was reviewed by the Judicial Security Division on April 25, 2003. (*Id.*) Based on the review of the supplemental medical information, Allmond's status remained "medical determination deferred pending further documentation." (*Id.*) The reviewing physician, Louis Chelton, determined that Allmond's unaided speech recognition in quiet did not meet the required standard. (*Id.*) Dr. Chelton requested that additional information be provided by an audiologist. (*Id.*) During the time that Allmond's medical status with regard to his

hearing was under review Allmond was allowed to begin working for Akal.

The additional hearing information requested by Dr. Chelton was provided on May 8, 2003. (*Id.* at12.) Dr. Chelton reviewed the medical information on June 17, 2003, and determined that Allmond was not medically qualified to perform the essential functions of the job. Specifically, Dr. Chelton concluded,

> *The following medical condition(s) poses a significant risk to the health and safety of yourself and/or others in the performance of essential job functions.*
>
> According to the results of the tests provided by you from your audiologist, you have a severe conversational hearing loss. The tests confirm your decreased ability to distinguish speech in the absence of background noise (speech discrimination in quiet of 84% right and 68% left). Your impairment in performing this essential law enforcement function poses a significant threat to the health and safety of yourself, other law enforcement officers, and the public.

(*Id.*)

Although Dr. Chelton determined on June 17, 2003, that Allmond was not medically qualified to perform the essential functions of the job, no immediate action was taken by Akal and Allmond continued to work as a CSO at the Columbus courthouse until February 3, 2004. It is undisputed that during the period that Allmond worked at the

courthouse he did his job very well and never had any problems related to his hearing or otherwise. Allmond never owned or wore hearing aids during his employment with Akal. He obtained hearing aids for the first time in 2005. (Allmond Dep. at 22-23, 64.) At that time he obtained hearing aids for both ears. (Allmond Dep. at 82.)

On December 19, 2003, Allmond underwent his annual fitness for duty physical examination. The physical examination included a hearing test. The audiologist who conducted the December 19, 2003, exam noted that "[a]udiometric testing revealed similar test results as found on 3/20/2003." (Pl.'s Summ. J. Evid., Doc. 104-9 at 1.) As to the audiometric testing, the audiologist further noted:

> borderline normal hearing in the right ear, dropping to a mild sensorineural hearing loss at 2000 Hz and further dropping to a severe to profound sensorineural hearing loss in the high frequencies. Left ear test results indicate normal hearing, dropping to a mild sensorineural hearing loss at 500 and 1000 Hz and further dropping to a severe sensorineural hearing loss in the high frequencies. Excellent word recognition scores when words were presented at amplified levels.

(*Id.* at 1-2.) Allmond considered the December 19, 2003, test results to be good, (Allmond Aff., Doc. 104-17 ¶ 4), but also conceded that he has a limited understanding of the tests and forms that were used. (Allmond Dep. at 19-20.)

In a letter dated February 2, 2004, Akal was advised by the United States Marshals Service that Allmond did not meet the contract medical requirements for a CSO. (Pl.'s Summ. J. Evid., Doc. 104-9 at 4.) The contracting officer who wrote the letter, Maxine Robinson, informed Akal that Almond [sic] was to be removed immediately from his position under the CSO contract. (*Id.*) In a letter dated February 3, 2004, Akal advised Allmond of the communication from the Marshals Service and further advised him that he was "medically disqualified" from the CSO position and, therefore, terminated from employment effective immediately. (*Id.* at 3.)

After Allmond received notice of his termination, he contacted a human resources officer for Akal and asked her to explain the basis of the decision to terminate his employment. (Allmond Dep. at 57.) He claims that she told him that he was being terminated on the basis of his initial hearing test. (Allmond Dep. at 57.) He then asked if he could use hearing aids. (Allmond Dep. at 57.) According to Allmond, he was told, "Hearing aids don't count." (Allmond Dep. at 57-58.)

Believing that the decision to terminate him was unlawful, Allmond sued Akal and the United States Marshals Service. Allmond contends that the Government's requirement that he pass a hearing test without a hearing aid is a screening test that screens out the disabled. (Compl. ¶ 14). It is Allmond's contention that Defendants' actions against him

served to violate the Americans with Disabilities Act, 42 U.S.C.A. § 12112(b)(6), and the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701 to 796*l*. (Compl. ¶ 20.)[2]

After engaging in discovery, the parties filed the Motions that are the subject of this Order. In their Motion for Summary Judgment, Defendants argue they are entitled to judgment as a matter of law as to all issues raised by the Complaint. In his Motion for Partial Summary Judgment, Allmond seeks judgment as a matter of law on three grounds: 1) that he has a disability in that he was regarded as having a substantial hearing impairment; 2) the Government's limitations on the use of hearing aids for testing purposes violate the law; and 3) Akal is liable for the Government's violations of disability law. The court will address the parties' contentions below.

II. CONCLUSIONS OF LAW

Congress enacted the Americans with Disabilities Act in order to, among other things, "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C.A. § 12101(b)(1) (West 2005). In enacting the ADA, Congress expressed its intent to

---

[2] Discrimination claims under the Rehabilitation Act are governed by the same standards used in ADA cases. *See* 29 U.S.C. § 794(d) *and Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000). Therefore, the Court will hereinafter refer to Allmond's claims as having been brought under the ADA, but the discussion applies equally to the Rehabilitation Act claims.

address discrimination based on stereotypical notions about disabilities. *Id.* § 12101(a)(7). Toward that end, Congress defined "disability" under the ADA to include not only those individuals with physical or mental impairments, but also those individuals regarded as having such impairments. *Id.* § 12102(2).

In its efforts to address disability discrimination, Congress extended the ADA to employers, enacting the following general rule:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Id. § 12112(a). Thus, an individual who seeks to make a claim under the ADA that he was discriminated against under the "general rule," that is to say in the "terms, conditions, and privileges of employment" (the classic disparate treatment case), must show that he was a qualified individual with a disability and that his employer intentionally discriminated against him because of the disability. *See, e.g., Cash v. Smith*, 231 F.3d 1301, 1305 (11th Cir. 2000) ("In order to establish a prima facie case of discrimination under the ADA, [a plaintiff] must demonstrate that [he] (1) is disabled, (2) is a qualified individual, and (3) was subjected to unlawful discrimination because of [his] disability.").

If an ADA plaintiff proceeding under the general rule can satisfy a prima facie case of discrimination, then the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), comes into play. *See Carlson v. Liberty Mut. Ins. Co.*, No. 06-15417, 2007 WL 1632267, *1 (11th Cir. June 7, 2007) (unpublished op.) (holding that burden-shifting analysis of *McDonnell Douglas Corp.* applies in ADA cases). Under this standard, the burden would shift to the defendant employer to offer a legitimate, nondiscriminatory reason for its employment decision. If it does so, the burden shifts back to the plaintiff to show that the proffered reason for the employer's decision was pretextual.

The general rule, however, is only that, a general rule. In defining employment discrimination under the ADA, Congress extended it to cover situations that do not fall within the traditional disparate treatment framework, including the following:

> using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C.A. § 12112(b)(6) (West 2005). Numerous federal appellate circuit courts have declined to apply the *McDonnell Douglas* analysis to claims brought

pursuant to § 12112(b)(6). In *Davidson v. America Online, Inc.*, 337 F.3d 1179 (10th Cir. 2003), the court explained that the burden-shifting framework "may be unnecessary and inappropriate" if the "employer admits that the disability played a prominent part in the decision, or the plaintiff has other direct evidence of discrimination based on disability." *Id.* at 1189. The court further explained:

> Instead, an employer will defend its decision on the ground that plaintiff is not otherwise qualified for the position, with or without reasonable accommodation. The *McDonnell Douglas* burden shifting approach is unnecessary because the issue of the employer's intent has been admitted and the plaintiff has direct evidence of discrimination on the basis of his disability. If the plaintiff in such a case is in fact statutorily disabled, the determinative issue in the case will not be the employer's intent, but whether the employee is 'otherwise qualified,' with or without reasonable accommodation, to perform the job, a factual dispute that is resolved through traditional methods of proof.

Id. (citing *Monette v. Elect. Data Sys. Corp.*, 90 F.3d 1173, 1182 (6th Cir. 1996)). In *Davidson*, the court held that because the employer relied on the employee's disability when it took an adverse action against him, the *McDonnell Douglas* framework was inapplicable. *Id.* Instead, the court considered only whether the employee was a qualified individual, as defined by the ADA. *Id.*

substantially limits a major life activity. The Supreme Court of the United States has explained that there are two ways in which an individual may be regarded as substantially limited in a major life activity: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." *Sutton*, 527 U.S. at 489, 119 S. Ct. at 2139. The Court further explained: "In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting." *Id.*

Here, Allmond contends Defendants regarded him as being substantially limited in the major life activities of hearing and working. The Court will address each of these contentions.

1. The Major Life Activity of Hearing

In support of his contention that Defendants regarded him as substantially limited in the major life activity of hearing, Allmond points to Dr. Chelton's determination, in his review dated June 17, 2003, that Allmond had "a severe conversational hearing loss." Allmond also relies on Defendants'

interrogatory responses, in which Defendants stated the following:

> Based upon Mr. Allmond's medical records and hearing test results, [the Federal Occupational Health Law Enforcement Medical Program] made the medical determination that Mr. Allmond's hearing deficiency rendered him unable to perform adequately, or presented too great a risk of him not being able to perform adequately, the following essential job functions of the CSO position.

(Pl.'s Summ. J. Evid., Doc. 101-19.) The interrogatory response then identified the essential job functions listed below:

> to comprehend speech during face-to-face conversations;
>
> to comprehend speech during telephone conversations;
>
> to comprehend speech during radio transmissions;
>
> to distinguish higher frequency tones such as fire alarms and smoke detectors;
>
> to comprehend speech and distinguish sounds in loud and/or reverberant environments such as courthouse lobbies or in emergency situations; and
>
> to comprehend speech when he did not have eye contact with the speaker.

(*Id.*) Allmond contends that by taking the position that Allmond's known hearing limitations – identified

by Defendants as a severe conversational hearing loss – rendered him unable to perform the foregoing essential job functions, Defendants regarded him as being substantially limited in the activity of hearing.

Defendants take the position that there is no evidence that they viewed Allmond as substantially limited in his ability to hear. They contend that the determination by Chelton that Allmond had a "severe conversational hearing loss" is not "equivalent to a perception that [Allmond] could not hear" but, instead, was a determination that Allmond failed to meet the requirement that he be able to hear 90% of the spoken words out of each ear when tested in quiet. (Def.'s Am. Mem. Supp. Mot. Summ. J., Doc. 79 at 21.) In support of their position, they have provided, among other things, the declaration of Louis Chelton, in which he states that when he used the phrase "severe conversational hearing loss," he did not intend to indicate that Allmond was impaired in his ability to hear generally. (Chelton Decl. ¶ 6, Doc. 78-23.)

In the Court's view, issues of fact remain for determination by a jury as to whether Defendants regarded Allmond as substantially limited in the major life activity of hearing. Defendants' intent in declaring Allmond to have a "severe conversational hearing loss" is a matter for a jury to decide. Therefore, insofar as Plaintiff's Motion for Summary Judgment requires a determination that Defendants regarded him as substantially limited in the major life activity of hearing, that Motion is denied.

2. The Major Life Activity of Working

In addition to contending that Defendants regarded him as substantially limited in the major life activity of hearing, in a footnote (Pl.'s Mot. Partial Summ. J., Doc. 80-1 at 6 n.4), Allmond contends he is entitled to judgment as a matter of law on the issue of whether Defendants regarded him as substantially limited in the major life activity of working. Allmond contends that the limitations perceived by Defendants on Allmond's hearing ability, particularly his inability to comprehend speech during face-to-face conversations, would preclude him from working in all law enforcement jobs. Defendants have moved for summary judgment on this issue, as well, contending they are entitled to judgment as a matter of law on the issue of whether they viewed him as substantially limited in his ability to work.

The Supreme Court has never issued an opinion in which it has concluded that working is a major life activity under the ADA. However, decisions of the Eleventh Circuit treat working as a major life activity. *See, e.g., Mullins v. Crowell*, 228 F.3d 1305, 1313 (11th Cir. 2000) (noting that precedent treating working as a major life activity is still valid after *Sutton* and holding that district court erred by interpreting the Rehabilitation Act to the contrary). Therefore, this Court will likewise treat working as a major life activity for purposes of the ADA and Rehabilitation Act claims at issue here.

In order to prevail under the theory that he was regarded by Defendants as being substantially limited in the major life activity of working, Allmond must show that as a result of the perceived disability he was "'significantly restricted in the ability to perform either a *class of jobs or a broad range of jobs* in various classes as compared to the average person having comparable training, skills and abilities.'" *Rossbach v. City of Miami*, 371 F.3d 1354, 1359 (11th Cir. 2004) (quoting 29 C.F.R. § 1630.2(j)(3)(i)). In *Rossbach*, the court further emphasized the following:

> The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. Thus, an impairment must preclude – or at least be perceived to preclude – an individual from more than one type, even if the job foreclosed is the individual's job of choice.

Id. at 1359 (citing *Sutton*, 527 U.S. at 492, 119 S. Ct. at 2151). In *Rossbach*, the court held that the job of "police officer" is "too narrow a range of jobs to constitute a 'class of jobs' as that term is defined in the EEOC regulations." *Id.* at 1361. The court upheld the district court's determination that the plaintiff police officer in *Rossbach* failed to demonstrate that his physical impairments substantially limited a major life activity.

Unlike the plaintiff in *Rossbach*, here Allmond argues that Defendants perceived his physical impairments as precluding him from working in the field of law enforcement, not just in the CSO position.

He contends that this result is demonstrated by the testimony of Defendants' witnesses in which they concede that, in general, law enforcement officials need to be able to satisfy the essential job functions that they determined Allmond was unable to perform as a CSO. Some of the evidence on which Allmond relies for this contention is set out below:

(1) The deposition of Dr. Richard Miller, taken in a different case against the same Defendants, from which the following exchange was excerpted:

> Q Now, do you, as the doctor, the occupational medicine doctor who is the head of the Law Enforcement Medical Program for the United States government, does comprehend speech mean something other than – other – other than understanding speech to you?
>
> A. No.
>
> Q. Okay. And going down that list, using the words you used as a general proposition, you agree that for weapons-carrying law enforcement people, they need to understand speech on the telephone, too, don't they?
>
> A. Yes.
>
> Q. And they need to be able to understand speech during radio transmissions, don't they?
>
> A. Yes.

Q. And they need to be able to understand speech when their vision is blocked from seeing the person talking?

A. Yes.

Q. Okay. And hear sounds that require investigation?

A. Yes.

Q. That's common to law enforcement, isn't it?

A. In general it is common.

(Pl.'s Summ. J. Evid., Ex. U, Doc. 104-2 at 2.)

2) The deposition of Thomas Galgon, the United States Marshal's Service's Chief Inspector of Judicial Protective Services, taken on November 18, 2005, from which the following exchange was excerpted:

Q. Would you anticipate as a security professional that the vast majority of people in law enforcement work would need to be qualified to comprehend speech during radio transmissions?

THE WITNESS: Again it would depend on whether their responsibilities included carrying a radio and being able to do that.

Q. Isn't it your understanding that most law enforcement officers do carry radios?

> THE WITNESS: Yes, I would agree that most police officers carry radios.
>
> Q. So if someone is not able to comprehend speech during radio transmissions, they would not be well suited for law enforcement work; is that a fair statement?
>
> THE WITNESS: I think that they would not be able to perform in a job that required them to carry a radio and comprehend radio transmissions.

(Pl.'s Summ. J. Evid., Ex. FF, Doc. 104-15 at 2.)

3) The deposition of Doctor Louis Chelton, taken in this case on October 27, 2005, from which the following exchange was excerpted:

> Q. (By Mr. Griffin) Right. Am I right in saying it's important that we – that law enforcement people be able to discriminate or understand speech even in a noisy background sometimes?
>
> A. Correct.

(Pl.'s Summ. J. Evid., Ex. JJ, Doc. 104-19 at 1.)

4) The Declaration of Dr. Carl Hansen, a vocational rehabilitation counselor, who asserted the following on July 27, 2006:

> My professional opinion is that if Mr. Almond's [sic] hearing impairment existed as perceived by the U.S.M.S. (i.e. caused him to have "severe conversational hearing loss" which in turn kept him from being able to

> understand face to face conversations and have telephone conversations), that he would be precluded from virtually all jobs in the class of jobs of law enforcement. This is because virtually every law enforcement job requires the ability to understand face to face conversations and telephone conversations. Thus if Mr. All[ ]mond's [sic] hearing was as poor as the U.S.M.S. perceived it, he would not be able to work in the class of jobs of law enforcement.

(Pl.'s Summ. J. Evid., Ex. KK, Doc. 104-20 at 2.)

Defendants take the position that the evidence establishes that the Government perceived Allmond only as unable to hear at a level sufficient to satisfy the CSO hearing standard and that the Government did not necessarily view Allmond as limited in performing a class of law enforcement jobs. (Defs.' Reply Pl.'s Resp. Def.'s Mot. Summ. J., Doc. 107-1 at 5.) Defendants assert that in order for Allmond to prevail as to this issue, he must come forward with evidence that the hearing standards employed by the Government for its CSOs are the same hearing standards employed by at [sic] other law enforcement agencies. (Defs.' Reply Pl.'s Resp. Def.'s Mot. Summ. J. at 6.) The Court disagrees.

In the Court's view there is sufficient evidence in the record from which a jury could conclude that Defendants perceived Allmond's physical impairments as precluding him from working in the field of law enforcement. It is not necessary, as Defendants

suggest that Plaintiffs put forth evidence that other law enforcement agencies utilized the same standards as those employed by the Government with respect to Allmond. It is enough that there is evidence in the record to show that the Government perceived Allmond as having a severe hearing loss; that the impairment prevented him from performing essential functions of the job, including comprehending speech during face-to-face conversations and during telephone conversations and radio transmissions; and that these same functions were essential to working in the field of law enforcement. Therefore, Defendants' Motion for Summary Judgment is denied as to this issue. To the extent that Allmond also seeks summary judgment as to that issue, fact issues preclude summary judgment, and Plaintiff's Motion is thus denied on the issue of whether Defendants regarded Allmond as substantially limited in the major life activity of working.

B. Otherwise Qualified.

Because this Court has concluded that fact issues exist with respect to whether Allmond had a disability as that term is defined under the ADA, the Court must next consider whether Allmond can show that he was otherwise qualified for the position. A qualified individual

> means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual

> holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position."

29 C.F.R. § 1630.2(m) (2006). "Determining whether a particular job duty is an essential function involves a factual inquiry to be conducted on a case-by-case basis." *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1258 (11th Cir. 2001). In deciding whether a particular job duty is an essential function, consideration is to be given to the employer's judgment. *Id.* Evidence of whether a particular function is essential can also include the consequences of not requiring the individual to perform the function. 29 C.F.R. §1630.2(n)(3)(iv) (2006).

Although the regulations define a qualified individual as one who can perform the essential functions of the position, there is considerable debate among the circuits with respect to whether a disparate impact plaintiff must also show that he was qualified to perform the essential function challenged under 42 U.S.C.A. § 12112(b)(6). At least two circuits have concluded that a plaintiff challenging a qualification standard under § 12112(b)(6) need not also show that he was a "qualified individual" under the general rule of § 12112(a), which provides, in part, that no covered entity shall discriminate against a qualified individual with a disability. *See Bates v. UPS*, 465 F.3d 1069, 1081 (9th Cir. 2006), *rehearing en banc granted*, (discussing burdens under the ADA and holding that a plaintiff challenging a standard under § 12112(b)(6) does not bear the burden of

proving that he is qualified as to the essential job function the standard addresses) *and Monette*, 90 F.3d at 1184 (holding that in a claim brought pursuant to § 12112(b)(6), plaintiff bears the burden of showing he is disabled and qualified to perform the essential functions of the job, absent the challenged job requirement). *But see Davidson*, 337 F.3d at 1188-89 (noting § 12112(b)(6) as a distinct type of ADA discrimination, but stating, "No matter what type of discrimination is alleged, however, a plaintiff must establish first that he was a 'qualified individual with a disability.'").

This Court adopts the reasoning of the Ninth and Sixth Circuits and finds that in order to bring a challenge under § 12112(b)(6), Allmond does not bear the burden of proving that he is qualified as to the job function addressed by the allegedly illegal qualification standard. Consistent with the Sixth and Ninth Circuits, this Court will only require Allmond to show that he is disabled and qualified to perform the essential functions of the job, absent the challenged job requirement – in this case the ability to pass the required hearing test without the use of hearing aids. Under this standard, Allmond has shown that he is otherwise qualified.

Defendants do not take issue with Allmond's ability to perform the essential functions of the job – except insofar as those essential functions stem from his inability to pass the hearing test unaided. In other words, except as to the hearing standard challenged by Allmond as unlawful under § 12112(b)(6),

Defendants do not dispute that Allmond was qualified for the job. This Court has already determined that, for purposes of this disparate impact claim, Allmond need not prove that he was qualified as to that function. Therefore, Allmond has shown that he is a otherwise qualified for the position.

C. Business Necessity Defense

Because Allmond has shown that he is a qualified individual and the Court has determined that fact issues exist with respect to whether he had a disability, the Court must next consider whether Defendants can meet their burden of proving that the particular standard, employment test, or other selection criteria is "job-related for the position in question and is consistent with business necessity." 42 U.S.C.A. § 12112(b)(6) (West 2005). These terms are not easily defined or applied in the ADA context. Therefore, this Court will follow the lead of the United States District Court for the District of Kansas and apply the business necessity principles used in Title VII disparate impact cases. *Riechmann v. Cutler-Hammer, Inc.*, 183 F. Supp. 2d 1292, 1296 (D. Kan. 2001) (analyzing federal regulations and determining that regulations require consideration of analogous Title VII cases in Rehabilitation Act cases in which employer uses tests or other selection criteria to screen out handicapped persons).

In *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971), the Supreme Court held that the

business necessity defense in Title VII cases "placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question." *Id.* at 432, 91 S. Ct. at 854. With regard to employment tests, the Court also stated that with Title VII, Congress has commanded "that any tests used must measure the person for the job and not the person in the abstract." *Id.* at 436, 91 S. Ct. at 856.

In 1984, the Eleventh Circuit had the occasion to discuss the business necessity defense at length. In *Walker v. Jefferson County Home*, 726 F.2d 1554, 1558 (11th Cir. 1984), the court offered the following discussion of the standard and the relevant caselaw:

> In determining whether the employer has met its burden, the court looks at the amount of skill required for the position and the economic and human risks involved. "When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminate against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related." *Spurlock v. United Air Lines, Inc.*, 475 F.2d 216, 219 (10th Cir.1972). *See EEOC v. International Union of Operating Engineers, Local 14 & 15*, 553 F.2d 251 (2d Cir.1977) (union admission requirements of city

> operator's license, ability to operate more than one piece of equipment, and 200 days' experience were not job related); *Fisher v. Proctor & Gamble Mfg. Co.*, 613 F.2d 527, 541-42 n. 27 (5th Cir.1980), *cert. denied*, 449 U.S. 1115, 101 S. Ct. 929, 66 L. Ed.2d 845 (1981) (injunction against 20-year experience requirement for promotion from nonmanagement to management positions upheld in view of racial impact); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir.1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1020, 59 L. Ed.2d 74 (1979) (experience prerequisite for eligibility for apprenticeship program and on-the-job training found to perpetuate effects of past discrimination; district court ordered to consider whether experience prerequisite should be shortened). *Compare Spurlock v. United Air Lines, Inc.*, 475 F.2d 216 (10th Cir.1972) (job of airline flight officer requires high degree of skill, and economic and human risks are great); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir.1974), *cert. denied*, 419 U.S. 1122, 95 S. Ct. 805, 42 L. Ed.2d 822 (1975) (requirement that applicants for bus-driving position be younger than 35 years of age upheld on safety grounds).

Id. at 1558-59. Applying the factors discussed in *Griggs* and *Walker*, the Court finds that Defendants have shown that hearing requirements challenged by Allmond were job-related for the CSO position and consistent with business necessity.

The evidence unequivocally shows that Defendants undertook a study of the CSO position, that they engaged a physician experienced in law enforcement to lead the study, and that based on his recommendations, the standard at issue here was put in place. While the results of that study served to limit the employment of certain persons whose hearing fell below the designated standard, it did not foreclose entirely on the employment of those persons with hearing aids. Specifically, those persons whose hearing enabled them to meet the minimum threshold unaided were allowed to work with hearing aids, if they also satisfied those tests designed to ensure that the hearing aids were functioning properly.

Allmond heavily criticizes Defendants for setting standards based on events that may never occur, such as confrontations that might result in hearing aids being dislodged, but the human risks that are present with the CSO position not only permit such "what if" thinking, they demand it. It is the job of the CSO to be prepared for any occurrence. Likewise, it is the job of the Marshals Service to ensure that its CSOs are capable of meeting any occurrence, whether or not foreseeable. As to Allmond's suggestions to the contrary, the Court finds the reasoning of the United States District Court for the Southern District of Indiana in *Leverett v. City of Indianapolis*, 51 F. Supp. 2d 949 (S.D. Ind. 1999), to be persuasive.

In *Leverett*, the plaintiff challenged the City of Indianapolis's requirement that firefighters be capable of a minimum level of hearing in both ears.

The City maintained that the plaintiff's inability to localize sound would present a safety risk; the plaintiff challenged the medical basis for the City's conclusions. In finding for the City, the district court had this to say:

> The City's hearing test was not created arbitrarily, but rather was based upon the well supported medical opinion that the ability to hear in both ears relates directly to one's ability to localize sound and thus to perform the essential functions of a firefighter. . . .
>
> . . . . Plaintiff argues that such an opinion is not universally held in the medical community . . . and that some applicants with unilateral hearing may be able to localize sounds sufficiently well to perform their jobs. This may well be true, but the law does not require the City to put the lives of [plaintiff], his fellow firefighters, and the citizens they serve at risk by taking the chance that he can localize sound. . . . The lack of a precise or universally perfect fit between a job requirement and actual safe and effective performance is not fatal to a claim of job-relatedness, particularly when the public health and safety are at stake.

Id. at 958.

The Tenth Circuit has also noted that courts may consider risks to public health and safety when considering whether a particular standard is justified by business necessity. As the court noted in *Spurlock*

v. United Airlines, Inc., 475 F.2d 216, 219 (10th Cir. 1972), when determining whether defendants' hiring requirements for an airline flight officer were a business necessity, "when . . . the human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related." *Id.* at 219. With respect to the importance of the airline flight officer position, the court added, "The public interest clearly lies in having the most highly qualified persons available to pilot airliners. The courts, therefore, should proceed with great caution before requiring an employer to lower his pre-employment standards for such a job." *Id.* The same analysis applies to the CSO position.

In the employment discrimination setting, courts have been loathe to impose their judgment concerning personnel matters on defendant employers. As far back as 1991, the Eleventh Circuit adopted the view of the Seventh Circuit, noting in a Title VII case, "Federal courts 'do not sit as a super-personnel department that reexamines an entity's business decisions.'" *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991) (quoting *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988)). Other circuits have applied the same rationale to ADA cases. *See, e.g., Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1034 (8th Cir. 2005).

As the Seventh Circuit noted in *Erickson*, the ADA only condemns irrational distinctions based on disabilities. *Erickson*, 207 F.3d at 949. Where, as

here, a defendant relies on objectively reasonable medical evidence to conclude that a distinction based on a disability is necessary to protect the health and safety of the public, then an adverse action taken against an employee based on that distinction is not unlawful. In sum, Defendants have shown that the action challenged by Allmond is consistent with business necessity. As a result they are entitled to summary judgment as to his ADA claim brought pursuant to § 12112(b)(6). *See, e.g., Lee v. Fla., Dep't of Children & Family Servs.*, No. 03-16180, 2005 WL 139508, *2 (11th Cir. Apr. 27, 2005) (unpublished op.) (assuming prima facie showing by plaintiff in Title VII case, but granting summary judgment based on defendant's showing of business necessity).

III. CONCLUSION

In view of the foregoing, therefore, the Court finds that Defendants have demonstrated as a matter of law that the hearing standards challenged by Allmond were job-related and consistent with business necessity. As a result, Defendants have presented a successful defense to Plaintiff's employment discrimination claim and, therefore, Defendants' Motion for Summary Judgment is granted; Plaintiff's Motion for Summary Judgment is denied.

SO ORDERED, this the 28th day of September, 2007.

/s/ **Hugh Lawson**
HUGH LAWSON, JUDGE

mls

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-15561-BB

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY 28, 2009

THOMAS K. KAHN
CLERK

WILBUR ALLMOND,
a.k.a. Gene Allmond,
Plaintiff-Appellant,

versus
AKAL SECURITY INC.,
ERIC HOLDER, Attorney
General of the United States,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: EDMONDSON, Chief Judge, BLACK and PRYOR, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
CHIEF JUDGE

STATUTES INVOLVED

Section 102(a) of the Americans With Disabilities Act, 42 U.S.C. § 12112(a), provides:

> General Rule – No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment.

Section 102(b) of the Americans With Disabilities Act, 42 U.S.C. § 12112(b), provides in pertinent part:

> Construction – As used in subsection (a), the term "discriminate" includes –
>
> * * *
>
> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity. . . .

Section 103(a) of the Americans With Disabilities Act, 42 U.S.C. § 12113(a), provides:

> In General. – It may be a defense to a charge of discrimination under this Act that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this title.

Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), provides in pertinent part:

> No otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency.

SUPREME COURT, U.S.
FILED
DEC 18 2009
OFFICE OF THE CLERK

No. 09-379

In the Supreme Court of the United States

WILBUR ALLMOND, PETITIONER

v.

AKAL SECURITY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
ERIC FLEISIG-GREENE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Petitioner was medically disqualified from serving as a Court Security Officer because he failed to meet the hearing requirements of the United States Marshals Service, which mandate that officers possess a particular degree of unaided hearing. Petitioner brought suit claiming, *inter alia*, that the Marshals Service had violated the Rehabilitation Act, 29 U.S.C. 701 *et seq.*, by regarding him as disabled and adopting a hearing standard that tended to screen out individuals that were so regarded.

The question presented is whether the court of appeals properly held that petitioner had failed to rebut the Marshals Service's showing of business necessity.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 7
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Albertson's v. *Kirkingburg*, 527 U.S. 555 (1999) 11
Bates v. *United Parcel Serv., Inc.*, 511 F.3d 974 (9th Cir. 2007) 10
Beck v. *United States Marshals Serv.*, No. 02-1579-L (W.D. Okla. Nov. 4, 2004) 13
Bragdon v. *Abbott*, 524 U.S. 624 (1998) 11
Bush v. *Mukasey*, 268 Fed. Appx. 41 (2d Cir. 2008) 13
Chevron U.S.A. Inc. v. *Echazabal*, 536 U.S. 73 (2002) 11
EEOC v. *Agro Distrib., LLC*, 555 F.3d 462 (5th Cir. 2009) 13
EEOC v. *Exxon Corp.*, 203 F.3d 871 (5th Cir. 2000) 10, 11
FCC v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) 11
Fraterrigo v. *Akal Sec.*, No. 06-9861, 2008 WL 4787548 (S.D.N.Y. Oct. 29, 2008) 12, 13
Hurlbut v. *Akal Sec.*, No. 2:04-CV-121 (S.D. Ga. Feb. 15, 2006) 13
Kemp v. *Ashcroft*, No. 03-1633 (W.D. La. Mar. 3, 2009) 13
Leitch v. *MVM, Inc.*, 538 F. Supp. 2d 891 (E.D. Pa. 2007) 13

Cases—Continued: Page

Lytes v. *District of Columbia Water & Sewer Auth.*, 572 F.3d 936 (D.C. Cir. 2009) 13

McGovern v. *MVM, Inc.*, 545 F. Supp. 2d 468 (E.D. Pa. 2008) 12

McMullin v. *Ashcroft*, 337 F. Supp. 2d 1281 (D. Wyo. 2004) 13

School Bd. of Nassau County v. *Arline*, 480 U.S. 273 (1987) 11

Milholland v. *Sumner County Bd. of Educ.*, 569 F.3d 562 (6th Cir. 2009) 13

Strolberg v. *Akal Sec.*, 210 Fed. Appx. 683 (9th Cir. 2006) 13

Sutton v. *United Air Lines*, 527 U.S. 471 (1999) 14

Walton v. *United States Marshals Serv.*, 492 F.3d 998 (9th Cir. 2007), cert. denied, 128 S. Ct. 879 (2008) 13, 15

Watson v. *City of Miami Beach*, 177 F.3d 932 (11th Cir. 1999) 6

Statutes and regulation:

ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3555 13

Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* 2

42 U.S.C. 12102(2) 2

42 U.S.C. 12111(3) 7, 10

42 U.S.C. 12112(b)(6) 2

42 U.S.C. 12113(a) 2

42 U.S.C. 12113(b) 7, 10, 11

Statutes and regulation—Continued: Page

Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.* 2
29 U.S.C. 791(g) 2
29 U.S.C. 794(d) 2
28 U.S.C. 566(a) 2
29 C.F.R. 1614.203(b) 2

Miscellaneous:

EEOC, *Questions & Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008* (last modified Sept. 23, 2009) <http://www.eeoc.gov/policy/docs/qanda _adaaa_nprm.html> 13

In the Supreme Court of the United States

No. 09-379

WILBUR ALLMOND, PETITIONER

v.

AKAL SECURITY, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 558 F.3d 1312. The order of the district court (Pet. App. 11a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2009. A petition for rehearing was denied on May 28, 2009 (Pet. App. 47a-48a). On August 13, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including September 25, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, prohibits discrimination by federal agencies and federally funded programs against qualified individuals with disabilities. The scope of the Rehabilitation Act is defined in part through standards of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101 *et seq.* 29 U.S.C. 791(g), 794(d); see 29 C.F.R. 1614.203(b).

The ADA defines the term "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual," "a record of such an impairment," or "being regarded as having such an impairment," 42 U.S.C. 12102(2), and prohibits employers from using a qualification standard that screens out or tends to screen out individuals with disabilities unless the qualification standard is job-related and consistent with business necessity. 42 U.S.C. 12112(b)(6). "It may be a defense to a charge of discrimination * * * that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter." 42 U.S.C. 12113(a); see 42 U.S.C. 12112(b)(6).

2. Federal law assigns the United States Marshals Service the responsibility "to provide for the security * * * of the United States District Courts, the United States Courts of Appeals and the Court of International Trade." 28 U.S.C. 566(a). To fulfill that statutory mission, the Marshals Service contracts with private companies to supply security personnel, including Court

Security Officers (CSOs), at federal courthouses. Pet. App. 2a. Court Security Officers "perform a variety of protective services, such as guarding courthouse entrances, maintaining a security presence in courtrooms, and responding to emergency situations." *Ibid.*

In the wake of the bombing of a federal building in Oklahoma City, "and in response to judicial concern with the physical capability of security officers to respond to security threats and other emergency situations," the Judicial Conference of the United States asked the United States Public Health Service's Office of Federal Occupational Health to conduct a job task analysis of the CSO position. Pet. App. 2a-3a; Govt. C.A. Br. 4. Dr. Richard Miller, then the Director of Law Enforcement Medical Programs for the Office of Federal Occupational Health, conducted "a detailed analysis of the security officer position to identify the essential functions of the job and the medical qualifications necessary to perform it." Pet. App. 8a. The study included observation of CSOs on the job, convening of focus group discussions with CSOs, and individual interviews with judges and Marshals Service personnel regarding the demands of the CSO position. *Id.* at 3a.

The study identified six hearing-related tasks essential to the CSO position: "comprehending speech during face-to-face conversations, over the telephone, over the radio, and outside the range of sight; hearing sounds that require investigation"; and determining the location of sound. Pet. App. 3a. In particular, Dr. Miller concluded that CSOs must "be able to clearly understand directions in times of crisis [and] must be able to hear communication at a level of sound that does not inform persons causing an incident of the [officers'] response plans," and that these and similar hearing abilities are

integral to "[t]he safety of the federal judiciary, court personnel, and the public." *Ibid.* (internal quotation marks omitted; second and third brackets in original).

To ensure that all CSOs would be able to fulfill their essential job functions, Dr. Miller recommended specific changes to the CSO medical requirements, including new audiological standards. Pet. App. 3a-4a. Based on consultations with a specialist in law enforcement occupational audiology, as well as other experts in the field, Dr. Miller concluded that CSOs should be required to pass their hearing tests without the assistance of a hearing aid. *Ibid.*; Govt. C.A. Br. 5 & 29 n.5. Dr. Miller's consultations with these specialists revealed that hearing aids, as mechanical devices, exhibit risks of battery failure, device failure, intermittent electronic interference or incompatibility with sound equipment, and failure caused by physical activity. *Id.* at 29-30. Intermittent conditions such as debris in the ear canal and improper seating or placement can also decrease or eliminate the effectiveness of the instrument. *Id.* at 30. The resulting standard required testing for unaided hearing because, in the event of any of these contingencies, CSOs must rely on their residual hearing to accomplish the immediate tasks before them. *Ibid.*

The new hearing standards accordingly permit some hearing loss, but require that candidates be able to meet the standards without the use of a hearing aid. Pet. App. 3a-4a, 12a-14a. CSOs who pass the hearing requirements without a hearing aid may wear hearing aids on the job, *id.* at 3a, 12a, but the requirements were designed to "ensure that all officers can perform effectively in the event their hearing aids experience interference, become dislodged, or otherwise fail on the job," *id.* at 4a.

3. Petitioner was employed by Akal Security, Inc., as a CSO in the United States District Court for the Middle District of Georgia. Pet. App. 11a-12a. Following a physical examination in February 2003, petitioner was informed that he had not satisfied the CSO hearing standards. *Id.* at 4a, 14a-15a. Petitioner was advised to see a specialist for additional tests; when the results confirmed that he was unable to meet the hearing standards, the government physician reviewing his file proposed further testing to ensure that the results accurately reflected petitioner's hearing ability. *Id.* at 4a, 15a-16a. Petitioner's third set of test results continued to evidence a "decreased ability to distinguish speech in the absence of background noise (speech discrimination in quiet of 84% right and 68% left)" that fell below the Marshals Service standards. *Id.* at 16a. The Marshals Service notified Akal of petitioner's CSO disqualification in February 2004, and Akal terminated petitioner's employment. *Id.* at 4a-5a.

4. Petitioner brought suit against Akal and the Attorney General, contending that the requirement that a CSO meet the Marshals Service hearing standards based on his natural hearing violated the ADA and the Rehabilitation Act. Pet. App. 5a. The district court granted summary judgment to respondents, holding that, although there was a genuine dispute whether petitioner had been regarded as disabled, *id.* at 25a-36a, the record unequivocally established that the hearing requirements are job-related and consistent with business necessity, *id.* at 39a-45a.

The Eleventh Circuit affirmed. Pet. App. 1a-10a. The court "express[ed] no view on whether Allmond [was] disabled under federal law," *id.* at 6a, but held that he had failed to raise a genuine issue of fact regarding

the defense of business necessity. The court explained that a defendant's burden of establishing such a defense is "generally quite high," but "is significantly lowered when, like here, the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great." *Id.* at 7a (quotation marks omitted).

The court held that the hearing standards are job related because they were derived from a "detailed analysis of the security officer position to identify the essential functions of the job and the medical qualifications necessary to perform it." Pet. App. 8a. The court observed that "hearing aids may malfunction, break, or become dislodged," and that this contingency "would present an unacceptable risk to the safety of others" if it occurred at a critical moment. *Id.* at 9a & n.8. Indeed, petitioner's experts had not disputed either point. See Govt. C.A. Br. 30-31. The court rejected petitioner's argument that the Marshals Service could not establish a business necessity defense for the hearing standards unless it could show examples of CSOs' hearing aids failing at times of crises, explaining that "neither the ADA nor the Rehabilitation Act requires employers to forgo a qualification standard 'until a perceived threat becomes real or questionable behavior results in injuries.'" Pet. App. 9a n.7 (quoting *Watson* v. *City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999)). In light of the uncontested risks acknowledged by both sides' experts, and "considered in the light of the tremendous harm that could result if a security officer could not perform the essential hearing functions of his job at a given moment," the court held the Marshals Service standards to be "legitimate and wholly consistent with business necessity." *Id.* at 9a.

ARGUMENT

Petitioner urges (Pet. 30) this Court to grant review of the court of appeals' holding that a business necessity defense "can be established merely by suggesting that there is a possibility, no matter how slight, that a situation 'may' arise in which the employment of a disabled worker could lead to injury." The court of appeals did not adopt the rule ascribed to it by petitioner, and thus there is no warrant for this Court to review such a rule in this case. It merely held that, on the record in this case, there was no genuine issue of material fact—a factbound issue unsuited for this Corut's review. Petitioner contends (Pet. 31) that this case presents an issue of substantial importance whether a safety-related business necessity defense must satisfy the "direct threat" standard of 42 U.S.C. 12113(b), which requires "a significant risk to the health or safety of others," 42 U.S.C. 12111(3). But petitioner did not make that argument before the court of appeals and this Court should not consider the issue in the first instance. Moreover, review by this Court is unwarranted because even if the question presented were resolved favorably to petitioner, it would not alter the outcome—his claim would still fail for the independent reason that he is not "disabled" within the meaning of the Rehabilitation Act. The petition should therefore be denied.

1. Petitioner seeks review by this Court of the question whether "it is lawful for an employer to dismiss a worker with a disability merely because a conceivable situation 'may' occur in which that employee would pose a risk to safety, without regard to how unlikely that occurrence might be." Pet. i. That question is not implicated by the decision below.

Petitioner faults the court of appeals for stating that hearing aids "may malfunction, break, or become dislodged," Pet. App. 9a, without assigning any particular quantum of likelihood to such occurrences. This statement, in petitioner's view, is tantamount to holding that "business necessity under the ADA and the Rehabilitation Act can be established merely by suggesting that there is a possibility, no matter how slight, that a situation 'may' arise in which the employment of a disabled worker could lead to injury." Pet. 30. Petitioner characterizes the government's arguments in the court below in similar fashion. See Pet. 15-20.

That is not the government's position, nor is it what the court of appeals held. The government does not contend, as petitioner suggests, that it is "legally irrelevant" whether hearing aids "fail once a week or only once a century," or that "*any* hypothetical risk means that an individual can be dismissed from [his or her] job." Pet. 18, 19-20 (brackets in original). Rather, the government has relied throughout this litigation on uncontradicted reports of several audiological experts for their analysis of the risk factors of hearing aids and their substantive conclusion that such risk factors, in this unique employment setting, make hearing aids appropriate for "use only as an enhancement and not as an alternative method to meet unaided hearing standards" for the CSO position. See Govt. C.A. Br. 30 (quoting Docket entry No. 78, Exh. 6 (attached Exh. A at 6) (July 3, 2006) (Kramer Decl.)); *id.* at 29-30; pp. 3-5, *supra*.[1]

---

[1] Petitioner cites one of his experts' affidavits as establishing that "hearing aids rarely fail." See Pet. 35 & n.44 (citing Docket entry No. 101, Exh. J at 2 (Aug. 11, 2006) (Ricketts Aff.)). But petitioner overstates the expert's testimony, which "acknowledged that batteries will fail, ear wax can lead to hearing aid failure and some cell phones can

Petitioner's experts failed to raise a genuine issue of material fact as to that issue. See Pet. App. 8a-9a; Govt. C.A. Br. 30-31. The court of appeals further relied, in particular, on the "tremendous harm that could result" to court officers, staff, or members of the public "if a security officer could not perform the essential functions of his job at a given moment." *Id.* at 9a. Although the court did not insist upon a precise quantification of the risk of failure, it did not suggest, as petitioner contends, that any hypothetical risk, however remote, would be sufficient.

Petitioner contends (Pet. 21-22) that the Eleventh Circuit's decision conflicts with the general rule that "the availability of a safety-based justification depends in part on the likelihood that employment of the worker in question would result in injury to others or to himself." But the decision below does not contradict that principle. The court's statement that hearing aids "may malfunction, break, or become dislodged," Pet. App. 9a, does not enunciate a new standard of law regarding the probability required to make out a showing of business necessity. Rather, the quoted language simply identified the numerous varieties of hearing aid failure—a fact that petitioner's experts did not dispute, see Govt. C.A. Br. 30-31 (discussing petitioner's experts' testimony). The court of appeals did not even directly address what quantum of risk of failure must be demonstrated—apart

---

interfere with some specific hearing aids." Docket entry No. 101, Exh. J at 2 (Aug. 11, 2006) (Ricketts Aff.). Although the report indicates that those risks can be mitigated to some degree, it does not suggest that they can be eliminated. *Ibid.* Moreover, that expert's analysis did not address many of the risks identified by the government's (and petitioner's) other experts—including other manners of device malfunction, improper seating, and acoustic feedback. *Ibid.*

from an observation that the burden of establishing business necessity is "generally quite high" but is reduced where the harm that would result if the risk were realized is great, Pet. App. 7a. That observation is entirely consistent with the cases upon which petitioner relies to evidence a supposed conflict with other circuits. See *EEOC* v. *Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000) ("The acceptable probability of an incident will vary with the potential hazard posed by the particular position.") (cited at Pet. 22); *Bates* v. *United Parcel Serv., Inc.*, 511 F.3d 974, 996 (9th Cir. 2007) (en banc) (quoting same) (cited at Pet. 23).

Petitioner contends (Pet. 35-36) that the court of appeals erred by failing to insist on a quantification of the probability that a CSO's hearing aid would fail at the precise moment that an emergency situation arose in which the CSO's inability to hear would be critical, thus leading to the injury of a judge or other individual at the court. Petitioner bases that contention on the premise that only when an employee presents a "direct threat," posing a "significant risk to the health or safety of others," can a safety-related employment standard qualify as a business necessity. See Pet. 31 (quoting 42 U.S.C. 12111(3), 12113(b)). But petitioner never argued in the court of appeals that the "direct threat" standard of Section 12113(b) was the appropriate measure for assessing the respondents' business necessity defense. Indeed, petitioner's sole reference to "direct threat" in his court of appeals' briefs was in a footnote of his reply brief in which petitioner noted that a cited case was a "direct threat case," in contrast to the "business necessity case[]" on which petitioner had relied in his opening brief. See Pet. C.A. Reply Br. 22 n.11. Nor did the court of appeals address the relevance of Section

12113(b) to business-necessity defenses based on safety-related qualifications. Because application of Section 12113(b) was neither pressed nor passed upon in the courts below, petitioner should not be allowed to urge that argument before this Court in the first instance. See *FCC* v. *Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) ("This Court * * * is one of final review, not of first view.") (internal quotation marks and citation omitted). As the Court has noted, it remains an open question "whether all safety-related qualification standards must satisfy the ADA's direct-threat standard." *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 80 n.3 (2002) (citing *Albertson's, Inc.* v. *Kirkingburg*, 527 U.S. 555, 569 n.15 (1999)). Petitioner's failure to invoke Section 12113(b) below—and the consequent lack of analysis from the court of appeals—renders this case a particularly poor vehicle in which to consider the rubric for assessing qualification standards under the Rehabilitation Act.[2]

At bottom, petitioner's grievance is with the court of appeals' application of the summary judgment standard to the facts of this case. Petitioner's repeated emphasis (Pet. 3-5 & n.3, 7-11, 23) on the records and outcomes in other suits against the Marshals Service makes that clear. Petitioner's contention that facts adduced in

[2] Petitioner's contention (Pet. 33) that review is warranted because the court of appeals' decision conflicts with this Court's opinion in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), is similarly misplaced. Petitioner did not discuss *Arline* in his court of appeals briefs. Moreover, the rule adopted by this Court in *Arline* was later codified in Section 12113(b), see *Bragdon* v. *Abbott*, 524 U.S. 624, 649 (1998); *Exxon*, 203 F.3d at 874. Thus, petitioner's invocation of *Arline* is in reality only another variation of his argument that all safety-based business-necessity defenses must satisfy the "direct threat" standard of Section 12113(b), an argument that petitioner failed to preserve.

other cases undercut respondents' business necessity defense—or that the court of appeals granted undue weight to particular evidence in this record—is not a ground for this Court's review.[3]

2. Review by this Court is particularly unwarranted in this case because resolution of the question presented would not alter the outcome of this case. Petitioner cannot recover under the Rehabilitation Act for an independent reason: he is not disabled under the terms of the Act. Although the court of appeals declined to ad-

---

[3] Petitioner is incorrect to suggest (Pet. 32) that the decision below conflicts with settlement agreements between the United States Department of Justice and localities regarding hearing aid restrictions. Those agreements note—consistent with the statute—that qualification standards tending to screen out individuals with disabilities are valid if they are shown to be job-related for the position in question and consistent with business necessity. See Govt. C.A. Br. 40 (citing agreements). The decisions below hold only that, on the record in *this* case, there was no genuine dispute of material fact regarding the respondents' business necessity defense. What the record in other cases, or out-of-court settlement agreements, may or may not have established is irrelevant. Even if there were a difference in the application of summary judgment principles between the courts below and district courts in other circuits, that would not warrant review by this Court of so fact-specific an issue.

To the extent the outcomes of other district court cases is relevant, the overwhelming majority of courts have granted summary judgment to defendants in cases similar to this, either on the business necessity defense or on the antecedent question whether the disqualified CSO was a qualified individual with a disability. See *Fraterrigo* v. *Akal Security*, No. 06-civ-9861, 2008 WL 4787548 (S.D.N.Y. Oct. 29, 2008) (business necessity); *McGovern* v. *MVM, Inc.*, 545 F. Supp. 2d 468, 476 (E.D. Pa. 2008) (otherwise qualified); see also p. 13, *infra* (citing cases holding that disqualified CSOs are not regarded as disabled).

dress the issue, Pet. App. 6a,[4] the majority of courts to do so have held that the Marshals Service does not regard a CSO as disabled under the statute simply because the individual was disqualified pursuant to the agency's medical guidelines. See *Walton* v. *United States. Marshals Serv.*, 492 F.3d 998, 1007 (9th Cir. 2007), cert. denied, 128 S. Ct. 879 (2008); *Bush* v. *Mukasey*, 268 Fed. Appx. 41 (2d Cir. 2008); *Strolberg* v. *Akal Sec., Inc.*, 210 Fed. Appx. 683 (9th Cir. 2006); *Kemp* v. *Ashcroft*, No. 03-1633 (W.D. La. Mar. 3, 2009); *Fraterrigo* v. *Akal Sec., Inc.*, No. 06-9861, 2008 WL 4787548 (S.D.N.Y. Oct. 29, 2008); *Leitch* v. *MVM, Inc.*, 538 F. Supp. 2d 891, 898-903 (E.D. Pa. 2007); *Hurlbut* v. *Akal Sec., Inc.*, No. 2:04-CV-121 (S.D. Ga. Feb. 15, 2006); *McMullin* v. *Ashcroft*, 337 F. Supp. 2d 1281, 1298-1299 (D. Wyo. 2004); *Beck* v. *United States Marshals Serv.*, No. 02-1579-L (W.D. Okla. Nov. 4, 2004).[5]

---

[4] The district court held that a genuine issue of material fact existed as to whether respondents had regarded petitioner as disabled. Pet. App. 25a-36a.

[5] The ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3555, which became effective on January 1, 2009, broadened the definition of disability under the ADA and thus under the Rehabilitation Act. The courts of appeals, however, have held that these amendments apply only prospectively. See *Lytes* v. *District of Columbia Water & Sewer Auth.*, 572 F.3d 936, 939-942 (D.C. Cir. 2009); *Milholland* v. *Sumner County Bd. of Educ.*, 569 F.3d 562, 567 (6th Cir. 2009) (citing cases); *EEOC* v. *Agro Distrib., LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009). The Equal Employment Opportunity Commission has likewise stated that the amendments apply only prospectively. See EEOC, *Questions & Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008* (last modified Sept. 23, 2009) <http://www.eeoc.gov/policy/docs/ qanda_adaaa_nprm.html> ("The ADAAA does not apply retroactively.").

To be "regarded as" disabled, an employer must perceive an employee or applicant to have an impairment that substantially limits a major life activity. However, as this Court has explained, an employer "is free to decide that some limiting, but not substantially limiting, impairments make individuals less than ideally suited for a job." *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 490-491 (1999) (emphasis omitted). The CSO medical guidelines are designed to assess a candidate's ability to fulfill the tasks of the CSO position, not a broad range of jobs or hearing in everyday life. Dr. Miller's study "was conducted, and the medical standards developed, specifically for the CSO position," and the resulting standards "were not meant to assess whether CSOs are medically qualified to perform other jobs or whether they are substantially limited in any major life activities." Docket entry No. 78, Exh. 3, at 5 (July 3, 2006) (Miller Decl. ¶12).[6] When evaluating CSO medical qualifications, the Marshals Service "does not consider whether the CSO's medical condition limits his or her ability to hold other jobs (including other law enforcement jobs) or affects his or her day-to-day activities," but is "only concerned with whether the individual meets the CSO medical standards and is capable of performing the essential functions of the CSO position." Docket entry No. 78, Exh. 1, at 8 (July 3, 2006) (Farmer

---

[6] See also Docket entry No. 78, Ex. 2, at 5 (July 3, 2006) (Roth Decl. ¶8) ("The study was designed solely for the purpose of devising standards for the CSO position. It was in no way intended to reflect a CSO's ability to engage in life activities or to perform other jobs, including other types of security work."); Docket entry No. 78, Ex. 1, at 4 (July 3, 2006) (Farmer Decl. ¶10) ("The study was conducted and the medical standards contained therein were based solely on the CSO position and not on any other position.").

Decl. ¶19). And when the Marshals Service instructed Akal to remove petitioner from the CSO contract, it did not do so because petitioner could not hear or work. Indeed, by petitioner's own account, it was "undisputed" that petitioner was able to work although he had "never owned or wore hearing aids" and did not "even realize[] * * * that there was anything wrong with his hearing." Pet. 12-13. Rather, the Marshals Service directed that petitioner be removed because he "d[id] not meet the contract medical requirements" for Court Security Officers specifically. Docket entry No. 104, Exh. Z at 4 (letter from Maxine Robinson to Daya Khalsa (Feb. 2, 2004)).

Resolution of the question presented accordingly would not alter the outcome of this case. A CSO's "failure to meet the USMS hearing standards does not raise a genuine issue of material fact that the USMS regarded her as disabled." *Walton*, 492 F.3d at 1007. Petitioner thus could not establish entitlement to relief under the Rehabilitation Act regardless of the particular standard that applies to respondents' business necessity defense.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MARLEIGH D. DOVER
ERIC FLEISIG-GREENE
Attorneys

DECEMBER 2009

No. 09-379

SUPREME COURT, U.S.
FILED
DEC 29 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

WILBUR ALLMOND,

Petitioner,

v.

AKAL SECURITY, INC., and ERIC HOLDER,
Attorney General of the United States,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, Washington 98195
(206) 616-3167

JOHN GRIFFIN
MAREK, GRIFFIN & KNAUPP
203 North Liberty Street
Victoria, Texas 77901
(361) 573-5500

KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Boulevard
Houston, Texas 77008
(713) 526-5677

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Argument 1

Conclusion 14

TABLE OF AUTHORITIES

Page

CASES:

Albertson's, Inc. v. Kirkingburg, 527 U.S. 555 (1999) 9

EEOC v. Exxon Corp., 203 F.3d 871 (5th Cir. 2000) 1, 2, 3

Gunnels v. Akal Security, Inc., (No. V-02-132, S.D.Tex.) 1, 2, 12

Verzeni v. Potter, 109 Fed.Appx. 485 (3d Cir. 2004) 3

STATUTES:

Section 12111(3) of the ADA 8, 9

Section 12112(a) of the ADA 8

Section 12112(b) of the ADA 8, 9

Section 12113(a) of the ADA 8, 9

Section 12113(b) of the ADA 8, 9

The Rehabilitation Act 8, 10, 11, 13

BRIEFS:

Brief for the Attorney General 4

Reply Brief of Appellant Allmond 3, 8

ARGUMENT

(1) The majority rule regarding the elements of a business necessity defense is not in dispute. In six circuits a defendant asserting that defense to a disparate impact claim must establish "the probability of occurrence" of the problem which the disputed practice is claimed to avoid. *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000); see Pet. at 12-30. From the outset of the instant litigation the key issue has been whether the Eleventh Circuit would reject that standard; that is precisely the outcome sought, and achieved, by the government in the court below.

The practice at issue in this case had earlier been challenged in *Gunnels v. Akal Security, Inc.*, (No. V-02-132, S.D.Tex.). There, as here, the defendant asserted that the USMS unassisted hearing test rule was required by business necessity. On February 19, 2004, the District Court in *Gunnels*, applying the Fifth Circuit standard in *EEOC v. Exxon Corp.*, denied the defense motion for summary judgment based on that asserted defense. The government agreed to settle *Gunnels* in March 2004.

The complaint in the instant case was filed in December 2004, nine months later. The instant case concerns the same USMS practice as in *Gunnels*, was brought against the same employer (Akal Security), and was filed by the same private attorneys. In seeking summary judgment below on its proffered business necessity defense, the defendants relied on essentially the same arguments and supporting

material which the court in *Gunnels* had earlier found insufficient under the Fifth Circuit's decision in *EEOC v. Exxon Corp.*. The defendants never claimed that they had "probability of occurrence" evidence with regard to any of the various hearing-aid related problems that they hypothesized might arise. In its brief in opposition the government does not assert that the record contains evidence that would satisfy that Fifth Circuit standard.[1] Thus in the litigation below the defendants could prevail only if the Eleventh Circuit adopted a business-necessity standard which – unlike the Fifth Circuit and other circuits – does not require proof of probability of occurrence.

In the court of appeals petitioner emphatically argued that the defendants had failed to establish the asserted business necessity defense because they had no evidence as to the likelihood that any of the hypothesized problems would ever actually occur.

> There simply is no proof in this record of *any* significant risk by allowing CSOs to hear well with hearing aids ... The defendants had the obligation to present evidence ... They could have presented data showing, for example, reliability problems of hearing aids, failure rates of hearing aids, CSO problems with hearing aids, or current

---

[1] The brief in opposition argues only that the record "does not suggest that [those possible problems] can be eliminated." (Br.Opp. n.1).

> law enforcement issues with hearing aids. They did not do so....[2]

Petitioner argued that such proof is a necessary element of a business necessity defense.

> [T]he parties part company over the notion that *any* hypothetical risk means that an individual can be dismissed from their job no matter how competent their performance is. Both logic and disability law disagree.... "[B]ecause few, if any, activities in life are risk free, *[School Board of Nassau County v.] Arline* [480 U.S. 273 (1987)] and the ADA do not ask whether a risk exists, but whether it is significant." *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998). There is no such showing here.[3]
>
> Were parties allowed to *speculate* about disability-related problems, the ADA and Rehabilitation Act would be written out of existence.... It is for this reason that the legal standard is not whether there is a conceivable risk but whether the risk is significant or substantial.[4]

Petitioner urged the Eleventh Circuit to apply the Fifth Circuit standard in *EEOC v. Exxon Corp.*, "which requires proof that the risks are real," and the Third Circuit standard in *Verzeni v. Potter*, 109 Fed.Appx.

---

[2] Reply Brief of Appellant Allmond at 25-26.

[3] *Id.* at 17 (emphasis in original).

[4] *Id.* at 21 (emphasis in original).

485 (3d Cir. 2004), "[which] requires that the employer prove ... the probabilities that the disability will cause harm."[5] The government, on the other hand, insisted that it had demonstrated the existence of business necessity simply by showing that "there is always an unavoidable possibility," which could not "be eliminated," that an employee's disability would lead to injury.[6]

The briefs in the court below thus presented a clear choice between two very different legal standards. The Eleventh Circuit adopted the business necessity standard that had been advanced by the government.

> Because hearing aids may malfunction, break, or become dislodged, the Marshals Service adopted the ban to ensure that all officers can perform their jobs safely and effectively in the event they must rely on their unaided hearing.... [W]e accept this justification as legitimate and wholly consistent with business necessity.

(Pet. App. 9a) (footnote omitted). This holding is perfectly straightforward. The "justification" which established business necessity was "[b]ecause hearing aids *may* malfunction, break, or become dislodged." (Emphasis added). The operative standard is "may,"

---

[5] *Id.* at 22 n.3, 23-24; see *id.* at 28-29 (citing *Strathie v. Dept. of Transportation*, 716 F.3d 227 (3d Cir. 1983)).

[6] Brief for the Attorney General at 31-32.

not, for example, "do often" or "will in a significant number of instances." As the court of appeals explained in an accompanying footnote, this "may" standard can be satisfied by a hypothetical problem that in reality "may never occur." (Pet. App. 9a n.7). The government had conceded that it was unaware of any instance in the history of law enforcement in which a hearing aid failure had caused a problem.[7]

The government makes several alternative efforts to explain away the literal language of the Eleventh Circuit opinion. First it contends that

> the court's statement that hearing aids "may malfunction, break, or become dislodged," does not enunciate a new standard of law regarding the probability required to make out a showing of business necessity. Rather, the quoted language simply identified the numerous varieties of hearing aid failure....

(Br.Opp. 9). But the next sentence in the court's opinion expressly characterizes the quoted passage, not as a mere "identifi[cation]" of some facts about hearing aids, but as the "justification" which the court of appeals found legally sufficient.

Second, the brief in opposition asserts that the Eleventh Circuit found that business necessity had been established by "the uncontested risks acknowledged by both sides' experts." (Br.Opp. 6). But the

---

[7] R5-101, Ex. G at 31; R5-101, Ex. U at 284-85.

only thing that was "uncontested" was that the problems hypothesized by the defendants were not impossible. The plaintiff's witnesses insisted those imagined scenarios were "quite unlikely."[8]

Third, the government contends that the court of appeals "merely held that, on the record in this case, there was no genuine issue of material fact." (Br.Opp. 7). But the court's holding relied only on a single part of the record, which the Eleventh Circuit regarded as legally conclusive: "hearing aids may malfunction, break, or become dislodged." (Pet. App. 9a). If this alone is legally sufficient, as the court of appeals held, that has to mean that no additional evidence, such as the probability of occurrence evidence required by the Fifth Circuit, is necessary in the Eleventh Circuit.

Fourth, the government asserts that "[t]he court of appeals did not even directly address what quantum of risk of failure must be demonstrated." (Br.Opp. 9). On that view the Eleventh Circuit left unresolved whether a showing of business necessity requires probability of occurrence evidence. But it is clear on the face of the opinion that the Eleventh Circuit held that the defendants had established a business necessity defense without any such evidence; that has to mean that probability of occurrence evidence simply is not required in the Eleventh Circuit. The Eleventh Circuit's insistence that business necessity can be based on a problem "that

---

[8] R4-78, Ex. 4 at 170, 173.

may never occur" certainly concerns the quantum of risk. (Pet. App. 9a n.7).

The brief in opposition objects that the government never asked the court of appeals, in so many words, to hold that any possibility of a problem is sufficient to establish business necessity. Instead, the government argues, it merely relied in the court below on testimony of government witnesses who favored the disputed requirement. (Br.Opp. 8).[9] But in the Eleventh Circuit petitioner attacked the legal sufficiency of that testimony on precisely the ground at issue here, that the witnesses in question admitted they had no information at all regarding how often, if at all, the problems they hypothesized actually occurred.

> Dr. Kramer – the government's only expert – specifically ... admitted he had reviewed no scientific studies or data about hearing aids.... And Dr. Miller ... in a deposition ... gave the following testimony
>
> * * *
>
> Q. Have you come across any studies or published articles that suggest the likelihood or not that hearing aids are going to fail when

[9] The government characterizes as "uncontested" the testimony of its witnesses in favor of the disputed unassisted hearing test. (Br.Opp. 8). To the contrary, the plaintiff's witnesses insisted that that requirement was entirely unwarranted. (R101, Ex. J-1 at 3).

> used by law enforcement officers such as CSOs?
>
> A. No.[10]

There is no meaningful distinction between arguing that a defendant can establish business necessity without proof of probability of occurrence and arguing that a defendant can establish business necessity by relying on the testimony of a witness who reached his conclusion without having any information about probability of occurrence.

(2) The government does not deny that petitioner expressly urged the court of appeals to hold that a safety-related business necessity defense requires a showing of the likelihood that the disabled worker could cause harm to himself or others. (See pp. 2-3, 7-8). It objects, however, that petitioner's appellate brief did not refer to the section 12111(3) definition of "direct threat." (Br.Opp. 7, 11).

But the claim asserted in this case is under sections 12112(a) and 12112(b) of the ADA and under section 501 of the Rehabilitation Act. Section 12111(3) itself does not even create a cause of action. The government in this case has asserted a business necessity defense under sections 12112(b) and 12113(a), not a direct threat defense under section 12113(b).

---

[10] Reply Brief of Appellant Allmond at 19-20.

The petition pointed out that in its brief in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the government had argued that a safety-related business necessity defense requires proof of "significant risk." (Pet. 31 and n. 41). We noted that among the reasons advanced by the Solicitor General for adopting that proposed standard was a suggestion that the courts utilize in evaluating a safety-related business necessity defense under sections 12112(b) and 12113(a) the "significant risk" standard that would be applicable to a direct threat defense under section 12113(b). The government did not contend, nor do we, that the definition of "direct threat" in section 12111(3) is actually the statutory definition of "business necessity."

The government's argument in *Albertson's* regarding section 12111(3) is neither a distinct legal "issue" (Br.Op. 7) nor "the premise" of petitioner's contention that a business necessity defense requires a demonstration of the probability of occurrence. (Br.Opp. 10). Rather, it is simply one of a number of contentions that might support adoption of the Fifth Circuit probability of occurrence standard or some similar requirement, such as the "significant risk" standard proposed by the government itself in *Albertson's*.

The government cannot be suggesting that a petitioner, having squarely raised a specific issue in the court of appeals, would at the merits stage in this Court be limited to only the particular legal

authorities and precedents which were relied on in the lower courts. When the United States presents a merits argument as a petitioner, it has never regarded itself as restricted in the reasoning and materials which it can advance to the legal analysis and authorities that were earlier raised in the lower courts by government attorneys outside the office of the Solicitor General.

(3) At the time this action was filed, a plaintiff suing under the Rehabilitation Act or the ADA was required to show that he or she was, or was regarded as, disabled. In the instant case the district court held that there was a genuine issue of material fact regarding whether the defendants regarded Allmond as disabled, and set that question for trial. (Pet. App. 27a-36a). The government predicts it will prevail at trial on this issue, and argues that a resolution of the question presented in favor of petitioner thus would not alter the outcome of this case. (Br.Opp. 7, 13-15).

The government bases its prediction of a successful trial outcome on remand on the result in "the majority of" the other cases in which a dismissed CSO contended he or she was regarded as disabled. (Br.Opp. 13). The government argues that the general rationale for the unassisted hearing requirement does not assume that all individuals who fail to meet that requirement are disabled. (Br.Opp. 14). But in the instant case, as the district court noted, there was considerable evidence that federal officials specifically regarded Allmond as disabled, and believed

that an individual with his hearing loss would be disqualified from a wide range of positions. (Pet. App. 27a-36a). The brief in opposition contains no discussion of the evidence actually relied on by Allmond and the district court regarding this issue.

In any event, the question of whether Allmond was regarded as disabled is entirely distinct from the question of whether the challenged practice is unlawful under the ADA and the Rehabilitation Act. When, as here, a complaint is dismissed on one ground, it is commonly the case that there are other, unresolved issues on which the defendant might ultimately prevail at trial if the dismissal were overturned. The existence of such an unrelated issue does not make this case an inappropriate vehicle for resolving the question presented.

(4) The government insists that there is no conflict between the position of the Civil Division in the instant case, defending the USMS unassisted hearing test, and the action the Civil Rights Division attacking the legality of the identical requirement when utilized by local law enforcement agencies. The Brief in Opposition asserts that each of these actions turned on "the record" in the case at issue. (Br.Opp. 12 n.3).

But the element of the record in the instant case to which the Civil Division, and the court of appeals, attached controlling significance was simply the fact that "hearing aids may malfunction, break, or become dislodged." (Pet. App. 9a). That fact is assuredly true

of the hearing aids at issue in the cases initiated and settled by the Civil Rights Division. The actions of the Civil Rights Division obviously were not premised on a record showing that hearing aids used by local police officers and sheriffs' deputies are somehow different from and superior to the hearing aids used by CSOs.

In this Court the government appears to suggest that the unassisted hearing requirements might be legal in some instances (such as for the CSOs in the federal courthouse in Honolulu) but not in others (such as the Honolulu police). Elsewhere, however, the Department of Justice has insisted that the legal status of this requirement is the same in all situations, although offering conflicting accounts of what that legal status is. In *Gunnels*, for example, the USMS asserted that use of a non-assisted hearing requirement is always a matter of business necessity in the law enforcement context, broadly insisting that "[h]earing aids are not an acceptable means of meeting the hearing standard of law enforcement positions." 2004 U.S.Dist. LEXIS 31104 at 6 (S.D.Tex.). The Civil Rights Division, on the other hand, advised the Honolulu Police Department that "such a requirement imposes a per se ban on employment of persons with disabilities in violation of Title I and Title II of the ADA."[11]

---

[11] R5-101, Ex. P at 15.

(5) Because of the distinct responsibilities of separate agencies within the executive branch, those agencies at times take inconsistent positions in the lower courts. When an issue comes before this Court regarding which inter-agency differences have arisen, the Solicitor General often fashions a final government position which resolves those disagreements.

In this case, however, the Solicitor General has chosen not to do so. The Brief in Opposition is scrupulously neutral regarding the question presented, taking no position for or against the Fifth Circuit requirement of proof of probability of occurrence. The government response neither endorses nor disagrees with the decision of the Eleventh Circuit in this case. If certiorari is denied as the government urges, the Civil Division will remain free to argue that unassisted hearing tests are legally justified as a matter of business necessity, while the Civil Rights Division will continue to be at liberty to take legal action against any state or local law enforcement agency which uses such tests, and the EEOC can proceed against private employers which do so. The Department of Justice will persist in contending that the federal government itself is subject to a less demanding legal standard than the Department applies to state and local governments.

Such a topsy-turvy form of federalism is inconsistent with the terms of the ADA and the Rehabilitation Act, and with the structure of the Constitution. Although the Solicitor General assuredly has the discretion to permit the continuation of such differences

among federal agencies, this Court should exercise its discretion to grant certiorari to resolve the inter-circuit conflict that has resulted.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ERIC SCHNAPPER*
School of Law
University of Washington
P.O. Box 353020
Seattle, Washington 98195
(206) 616-3167

JOHN GRIFFIN
MAREK, GRIFFIN & KNAUPP
203 North Liberty Street
Victoria, Texas 77901
(361) 573-5500

KATHERINE L. BUTLER
BUTLER & HARRIS
1007 Heights Boulevard
Houston, Texas 77008
(713) 526-5677

Counsel for Petitioner

**Counsel of Record*